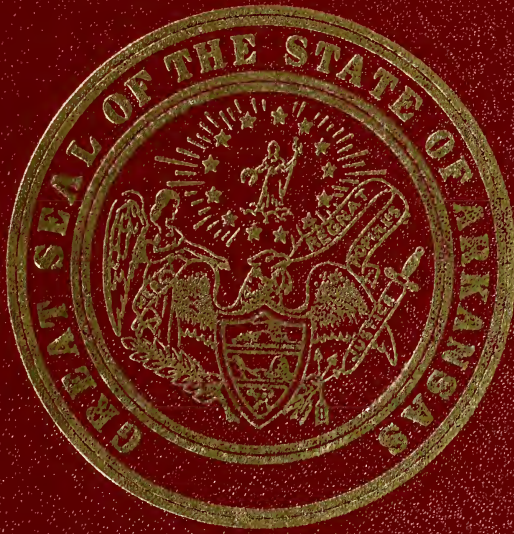


**ARKANSAS CODE  
OF 1987  
ANNOTATED**

**OFFICIAL EDITION**



**VOLUME 2C • TITLE 4, CH. 41-117**



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# ARKANSAS CODE OF 1987 ANNOTATED



## VOLUME 2C 2011 Replacement TITLE 4: BUSINESS AND COMMERCIAL LAW (CHAPTERS 41-117)

*Prepared by the Editorial Staff of the Publisher*

Under the Direction and Supervision of the  
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## Sources

This volume contains legislation enacted by the Arkansas General Assembly through the 2011 Regular Session. Annotations are to the following sources:

Arkansas Supreme Court and Arkansas Court of Appeals Opinions through 2011 Ark. LEXIS 519 (October 13, 2011) and 2011 Ark. App. LEXIS 652 (October 12, 2011).

Federal Supplement through October 7, 2011.

Federal Reporter 3d Series through October 7, 2011.

United States Supreme Court Reports through October 7, 2011.

Bankruptcy Reporter through October 7, 2011.

Arkansas Law Notes through the 2008 Edition.

Arkansas Law Review through Volume 61, p. 787.

University of Arkansas at Little Rock Law Review through Volume 30, p. 267.

ALR 6th through Volume 55, p. 635.

ALR Fed. 2d through Volume 46, p. 473.

## **Titles of the Arkansas Code**

- |   |  |
|---|--|
| 1. General Provisions   | 16. Practice, Procedure, and Courts                  |
| 2. Agriculture  | 17. Professions, Occupations, and<br>Businesses      |
| 3. Alcoholic Beverages  | 18. Property   |
| 4. Business and Commercial Law  | 19. Public Finance                                   |
| 5. Criminal Offenses  | 20. Public Health and Welfare                        |
| 6. Education  | 21. Public Officers and Employees                    |
| 7. Elections  | 22. Public Property                                  |
| 8. Environmental Law  | 23. Public Utilities and Regulated In-<br>dustries   |
| 9. Family Law   | 24. Retirement and Pensions                          |
| 10. General Assembly  | 25. State Government                                 |
| 11. Labor and Industrial Relations                                      | 26. Taxation   |
| 12. Law Enforcement, Emergency<br>Management, and Military Af-<br>fairs | 27. Transportation                                   |
| 13. Libraries, Archives, and Cultural<br>Resources                      | 28. Wills, Estates, and Fiduciary Re-<br>lationships |
| 14. Local Government  |  |
| 15. Natural Resources and Economic<br>Development                       |  |

## **User's Guide**

Differences in language, subsection order, punctuation, and other variations in the statute text from legislative acts, supplement pamphlets, and previous versions of the bound volume, are editorial changes made at the direction of the Arkansas Code Revision Commission pursuant to the authority granted in § 1-2-303.

Many of the Arkansas Code's research aids, as well as its organization and other features, are described in the User's Guide, which appears near the beginning of the bound Volume 1 of the Code.



# **TITLE 4**

## **BUSINESS AND COMMERCIAL LAW**

(CHAPTERS 1-24 IN VOLUME 2A; CHAPTERS 25-40 IN  
VOLUME 2B)

### *SUBTITLE 1. UNIFORM COMMERCIAL CODE*

#### CHAPTER.

1. GENERAL PROVISIONS.
2. SALES.
- 2A. LEASES.
3. NEGOTIABLE INSTRUMENTS.
4. BANK DEPOSITS AND COLLECTIONS.
- 4A. FUNDS TRANSFERS.
5. LETTERS OF CREDIT.
6. BULK TRANSFERS. [REPEALED.]
7. WAREHOUSE RECEIPTS, BILLS OF LADING, AND OTHER DOCUMENTS  
OF TITLE.
8. INVESTMENT SECURITIES.
9. SECURED TRANSACTIONS.
10. EFFECTIVE DATE AND REPEALER.
- 11-15. [RESERVED.]

### *SUBTITLE 2. MISCELLANEOUS COMMERCIAL LAW PROVISIONS*

#### CHAPTER.

16. GENERAL PROVISIONS. [RESERVED.]
17. CURRENCY.
18. WEIGHTS AND MEASURES.
19. TRANSMITTING UTILITY ACT.
20. MODEL REGISTERED AGENTS ACT.
- 21-24. [RESERVED.]

### *SUBTITLE 3. CORPORATIONS AND ASSOCIATIONS*

#### CHAPTER.

25. GENERAL PROVISIONS.
26. BUSINESS CORPORATIONS GENERALLY.
27. BUSINESS CORPORATION ACT OF 1987.
28. NONPROFIT ORGANIZATIONS.
29. PROFESSIONAL CORPORATIONS.
30. COOPERATIVE ASSOCIATIONS.
31. FOREIGN INVESTORS.
32. SMALL BUSINESS ENTITY TAX PASS THROUGH ACT.
33. THE ARKANSAS NONPROFIT CORPORATION ACT OF 1993.
34. REHABILITATIVE SERVICES CORPORATIONS, HABILITATIVE SERVICES  
CORPORATIONS, AND RURAL FIRE PROTECTION CORPORATIONS.
35. WATER AUTHORITY ACT.
- 36-40. [RESERVED.]

*SUBTITLE 4. PARTNERSHIPS*

## CHAPTER.

- 41. GENERAL PROVISIONS. [RESERVED.]
- 42. UNIFORM PARTNERSHIP ACT.
- 43. REVISED LIMITED PARTNERSHIP ACT OF 1991. [REPEALED.]
- 44. UNIFORM LIMITED PARTNERSHIP ACT. [REPEALED.]
- 45. FOREIGN LIMITED PARTNERSHIP ACT. [REPEALED.]
- 46. UNIFORM PARTNERSHIP ACT (1996).
- 47. UNIFORM LIMITED PARTNERSHIP ACT (2001).

*SUBTITLE 5. CONTRACTS, NOTES, AND OTHER COMMERCIAL INSTRUMENTS*

## CHAPTER.

- 56. GENERAL PROVISIONS.
- 57. INTEREST AND USURY.
- 58. ASSIGNMENTS.
- 59. FRAUD.
- 60. CHECKS.
- 61-69. [RESERVED.]

*SUBTITLE 6. BUSINESS PRACTICES*

## CHAPTER.

- 70. GENERAL PROVISIONS.
- 71. TRADEMARKS AND LABELS.
- 72. FRANCHISES.
- 73. SALES AND EXHIBITIONS OF ART.
- 74. GOING-OUT-OF-BUSINESS SALES.
- 75. UNFAIR PRACTICES.
- 76. COPYRIGHT ROYALTY COLLECTION.
- 77-85. [RESERVED.]

*SUBTITLE 7. CONSUMER PROTECTION*

## CHAPTER.

- 86. GENERAL PROVISIONS.
- 87. ARKANSAS EQUAL CONSUMER CREDIT ACT.
- 88. DECEPTIVE TRADE PRACTICES.
- 89. HOME SOLICITATION SALES.
- 90. AUTOMOBILES.
- 91. CREDIT SERVICES ORGANIZATIONS.
- 92. RENTAL PURCHASES.
- 93. CREDIT REPORTING DISCLOSURES.
- 94. HEALTH SPA CONSUMER PROTECTION ACT.
- 95. ARKANSAS MAIL AND TELEPHONE CONSUMER PRODUCT PROMOTION FAIR PRACTICES ACT.
- 96. FARM MACHINERY.
- 97. RETAIL PET STORES.
- 98. ARKANSAS PAY-PER-CALL CONSUMER PROTECTION ACT.
- 99. REGULATION OF TELEPHONIC SELLERS.
- 100. MOTOR VEHICLE TRANSFERS.
- 101. JEWELRY.
- 102. PRIZE PROMOTION.
- 103. CHARITABLE SOLICITATION.
- 104. CREDIT CARD SOLICITATION.
- 105. LEMON LAWS.

- 106. DISCOUNT CARDS.
- 107. CREDIT CARDS.
- 108. FUEL AND LUBRICANTS.
- 109. USE OF "NOTARIO" AND SIMILAR TERMS.
- 110. PERSONAL INFORMATION PROTECTION ACT.
- 111. CONSUMER PROTECTION AGAINST COMPUTER SPYWARE ACT.
- 112. ARKANSAS CONSUMER REPORT SECURITY FREEZE ACT.
- 113. CONNECT ARKANSAS BROADBAND PROGRAM.
- 114. SERVICE CONTRACTS ACT.
- 115. CREDIT CARD PROCESSING SERVICE.
- 116. REFUND ANTICIPATION LOAN ACT.
- 117. DISTRIBUTION OF DRUG SAMPLES.

## ***SUBTITLE 4. PARTNERSHIPS***

### **CHAPTER 41**

#### **GENERAL PROVISIONS**

[Reserved]

### **CHAPTER 42**

## **UNIFORM PARTNERSHIP ACT**

#### **SUBCHAPTER.**

- 1. PRELIMINARY PROVISIONS.
- 2. NATURE OF PARTNERSHIP.
- 3. RELATIONS OF PARTNERS TO PERSONS DEALING WITH THE PARTNERSHIP.
- 4. RELATIONS OF PARTNERS TO ONE ANOTHER.
- 5. PROPERTY RIGHTS OF A PARTNER.
- 6. DISSOLUTION AND WINDING UP.
- 7. MISCELLANEOUS PROVISIONS.
- 8. CONVERSIONS, MERGERS, AND CONSOLIDATIONS.

**Publisher's Notes.** For Commentary regarding the Uniform Partnership Act, see Commentaries Volume A.

Acts 1999, No. 1518, § 1204, provided: "Effective January 1, 2005, the following sections of the Arkansas Code are repealed: A.C.A. §§ 4-42-101 through 4-42-702."

Acts 1999, No. 1518, § 1205, provided: "(a) Before January 1, 2005, this chapter governs only a partnership formed:

"(1) after the effective date of this Act, unless that partnership is continuing the business of a dissolved partnership under Section 41 of the prior Uniform Partnership Act; and

"(2) before the effective date of this Act, that elects, as provided by subsection (c), to be governed by this Act.

"(b) Beginning January 1, 2005, this Act governs all partnerships.

"(c) Before January 1, 2005, a partnership voluntarily may elect, in the manner provided in its partnership agreement or by law for amending the partnership agreement, to be governed by this Act. The provisions of this Act relating to the liability of the partnership's partners to third parties apply to limit those partners' liability to a third party who had done business with the partnership within one year preceding the partnership's election to be governed by this Act, only if the third party knows or has received a notification of the partnership's election to be governed by this Act."

**Effective Dates.** Acts 1997, No. 912, § 16; Mar. 28, 1997. Emergency clause

provided: "It is hereby found and determined by the General Assembly of the State of Arkansas that the general and limited partners statutes [sic] need amending in order to be consistent with current trends. Therefore, an emergency is hereby

declared to exist and this Act being immediately necessary for the immediate preservation of the public peace, health, and safety, shall be in full force and effect from and after its passage and approval."

### RESEARCH REFERENCES

**ALR.** Multi-state law partnership of professional service corporation, propriety of formation. 6 A.L.R.4th 1251.

Right of partners to assert personal privilege against self-incrimination with respect to production of partnership books or records. 17 A.L.R.4th 1039.

Joint venture's capacity to sue. 56 A.L.R.4th 1234.

Ownership interest in employer business as affecting status as employee for workers' compensation purposes. 78 A.L.R.4th 973.

**Ark. L. Notes.** Matthews, Procedural Considerations in Bringing Suit Against a General Partnership in Arkansas, 1989 Ark. L. Notes 57.

Mathews, A Review of Arkansas Statutes Affecting Business and Other Organizations Enacted Since 1990, 1998 Ark. L. Notes 65.

Goforth, The Revised Uniform Partnership Act: Ready or Not, Here It Comes 1999 Ark. L. Notes 47.

**Ark. L. Rev.** Uniform Limited Partnership Act, 7 Ark. L. Rev. 283.

Looney, Legal and Economic Considerations in Drafting Arkansas Farm Leases, 35 Ark. L. Rev. 395.

Rosin, The Entity-Aggregate Dispute: Conceptualism and Functionalism in Partnership Law, 42 Ark. L. Rev. 395.

### CASE NOTES

**Cited:** *Stoutt v. Ridgway*, 9 Ark. App. 315, 658 S.W.2d 420 (1983); *Pate v. Mar-*

*tin*, 13 Ark. App. 182, 681 S.W.2d 410 (1985).

## SUBCHAPTER 1 — PRELIMINARY PROVISIONS

### SECTION.

4-42-101 — 4-42-105. [Repealed.]

**Cross References.** Venue of actions where more than one office maintained, § 16-60-105.

### RESEARCH REFERENCES

**Am. Jur.** 59A Am. Jur. 2d, Partn., § 1 et seq.

**C.J.S.** 68 C.J.S., Partn., § 1 et seq.

**4-42-101 — 4-42-105. [Repealed.]**

**Publisher's Notes.** Acts 1999, No. 1518, § 1204, provided: "Effective January 1, 2005, the following sections of the Arkansas Code are repealed: A.C.A. §§ 4-42-101 through 4-42-702."

These sections, concerning preliminary provisions, were repealed by Acts 1999, No. 1518, § 1204. The sections were derived from the following sources:

4-42-101. Acts 1941, No. 263, § 1; A.S.A. 1947, § 65-101.

4-42-102. Acts 1941, No. 263, § 2; A.S.A. 1947, § 65-102; Acts 1997, No. 912, § 2.

4-42-103. Acts 1941, No. 263, § 3; A.S.A. 1947, § 65-103.

4-42-104. Acts 1941, No. 263, § 4; A.S.A. 1947, § 65-104.

4-42-105. Acts 1941, No. 263, § 5; A.S.A. 1947, § 65-105.

**SUBCHAPTER 2 — NATURE OF PARTNERSHIP****SECTION.**

4-42-201 — 4-42-203. [Repealed.]

**RESEARCH REFERENCES**

**Am. Jur.** 59A Am. Jur. 2d, Partn., § 1 et seq.

**C.J.S.** 68 C.J.S., Partn., § 1 et seq.

**4-42-201 — 4-42-203. [Repealed.]**

**Publisher's Notes.** Acts 1999, No. 1518, § 1204, provided: "Effective January 1, 2005, the following sections of the Arkansas Code are repealed: A.C.A. §§ 4-42-101 through 4-42-702."

These sections, concerning nature of partnership, were repealed by Acts 1999, No. 1518, § 1204. The sections were derived from the following sources:

4-42-201. Acts 1941, No. 263, § 6; A.S.A. 1947, § 65-106; Acts 1997, No. 912, § 3.

4-42-202. Acts 1941, No. 263, § 7; A.S.A. 1947, § 65-107.

4-42-203. Acts 1941, No. 263, § 8; A.S.A. 1947, § 65-108.

**SUBCHAPTER 3 — RELATIONS OF PARTNERS TO PERSONS DEALING WITH THE PARTNERSHIP****SECTION.**

4-42-301 — 4-42-309. [Repealed.]

**RESEARCH REFERENCES**

**ALR.** Rights of attorneys leaving firm with respect to firm clients. 1 A.L.R.4th 1164.

Derivative liability of partner for punitive damages for wrongful act. 14 A.L.R.4th 1335.

Right of partner to assert privilege against self-incrimination with respect to production of partnership books or records. 17 A.L.R.4th 1039.

Professional services within meaning of statute preserving individual liability of professional employees of professional corporation, association, or partnership. 31 A.L.R.4th 898.

Form of business organization of successor or predecessor as affecting successor

liability. 32 A.L.R.4th 196.

Ownership interest in employer business as affecting status as employee for worker's compensation purposes. 78 A.L.R.4th 973.

**Am. Jur.** 59A Am. Jur. 2d, Partn., § 247 et seq., § 633 et seq.

**C.J.S.** 68 C.J.S., Partn., § 133 et seq.

## 4-42-301 — 4-42-309. [Repealed.]

**Publisher's Notes.** Acts 1999, No. 1518, § 1204, provided: "Effective January 1, 2005, the following sections of the Arkansas Code are repealed: A.C.A. §§ 4-42-101 through 4-42-702."

These sections, concerning relations of partners to persons dealing with the partnership, were repealed by Acts 1999, No. 1518, § 1204. The sections were derived from the following sources:

4-42-301. Acts 1941, No. 263, § 9; A.S.A. 1947, § 65-109.

4-42-302. Acts 1941, No. 263, § 10; A.S.A. 1947, § 65-110.

4-42-303. Acts 1941, No. 263, § 11; A.S.A. 1947, § 65-111.

4-42-304. Acts 1941, No. 263, § 12; A.S.A. 1947, § 65-112.

4-42-305. Acts 1941, No. 263, § 13; A.S.A. 1947, § 65-113.

4-42-306. Acts 1941, No. 263, § 14; A.S.A. 1947, § 65-114.

4-42-307. Acts 1941, No. 263, § 15; A.S.A. 1947, § 65-115; Acts 1997, No. 912, § 4.

4-42-308. Acts 1941, No. 263, § 16; A.S.A. 1947, § 65-116.

4-42-309. Acts 1941, No. 263, § 17; A.S.A. 1947, § 65-117.

## SUBCHAPTER 4 — RELATIONS OF PARTNERS TO ONE ANOTHER

### SECTION.

4-42-401 — 4-42-406. [Repealed.]

## RESEARCH REFERENCES

**ALR.** Breach of fiduciary duty to copartner on sale of partnership interest to another partner. 4 A.L.R.4th 1122.

Contractual restriction on right of accountant to practice, incident to sale or withdrawal from accountancy partnership. 13 A.L.R.4th 661.

Derivative liability of partner for punitive damages for wrongful act. 14 A.L.R.4th 1335.

Right of partner to assert privilege against self-incrimination with respect to production of partnership books or re-

cords. 17 A.L.R.4th 1039.

Civil liability of one partner to another or to the partnership based on partner's personal purchase of partnership property during existence of partnership. 37 A.L.R.4th 494.

Tort action for personal injury or property damage by partner against another partner or the partnership. 39 A.L.R.4th 139.

When statute of limitations commences to run on right of partnership accounting. 44 A.L.R.4th 678.

Enforceability of agreement restricting right of attorney to compete with former law firm. 28 A.L.R.5th 420.

**Am. Jur.** 59A Am. Jur. 2d, Partn., § 409 et seq.

**C.J.S.** 68 C.J.S., Partn., § 77 et seq.  
**U. Ark. Little Rock L.J.** Tyler, Survey of Business Law, 3 U. Ark. Little Rock L.J. 149.

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#### 4-42-401 — 4-42-406. [Repealed.]

**Publisher's Notes.** Acts 1999, No. 1518, § 1204, provided: "Effective January 1, 2005, the following sections of the Arkansas Code are repealed: A.C.A. §§ 4-42-101 through 4-42-702."

These sections, concerning relations of partners to one another, were repealed by Acts 1999, No. 1518, § 1204. The sections were derived from the following sources:

4-42-401. Acts 1941, No. 263, § 18; A.S.A. 1947, § 65-118; Acts 1997, No. 912, § 5.

4-42-402. Acts 1941, No. 263, § 19; A.S.A. 1947, § 65-119.

4-42-403. Acts 1941, No. 263, § 20; A.S.A. 1947, § 65-120.

4-42-404. Acts 1941, No. 263, § 21; A.S.A. 1947, § 65-121.

4-42-405. Acts 1941, No. 263, § 22; A.S.A. 1947, § 65-122.

4-42-406. Acts 1941, No. 263, § 23; A.S.A. 1947, § 65-123.

### SUBCHAPTER 5 — PROPERTY RIGHTS OF A PARTNER

#### SECTION.

4-42-501 — 4-42-505. [Repealed.]

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### RESEARCH REFERENCES

**ALR.** Civil liability of one partner to another or to the partnership based on partner's personal purchase of partnership property during existence of partnership. 37 A.L.R.4th 494.

**Am. Jur.** 59A Am. Jur. 2d, Partn., § 383 et seq.

**Ark. L. Rev.** Case Notes — Taxation — Federal Income Tax — Sale of a Partnership, 11 Ark. L. Rev. 193.

**C.J.S.** 68 C.J.S., Partn., § 77 et seq.

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#### 4-42-501 — 4-42-505. [Repealed.]

**Publisher's Notes.** Acts 1999, No. 1518, § 1204, provided: "Effective January 1, 2005, the following sections of the Arkansas Code are repealed: A.C.A. §§ 4-42-101 through 4-42-702."

These sections, concerning property rights of a partner, were repealed by Acts 1999, No. 1518, § 1204. The sections were derived from the following sources:

4-42-501. Acts 1941, No. 263, § 24; A.S.A. 1947, § 65-124.

4-42-502. Acts 1941, No. 263, § 25; A.S.A. 1947, § 65-125.

4-42-503. Acts 1941, No. 263, § 26; A.S.A. 1947, § 65-126.

4-42-504. Acts 1941, No. 263, § 27; A.S.A. 1947, § 65-127.

4-42-505. Acts 1941, No. 263, § 28; A.S.A. 1947, § 65-128.

## SUBCHAPTER 6 — DISSOLUTION AND WINDING UP

### SECTION.

4-42-601 — 4-42-615. [Repealed.]

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**Effective Dates.** Acts 1961, No. 421, § 4: Mar. 15, 1961. Emergency clause provided: "It is hereby found and declared by the General Assembly that much confusion exists regarding the dissolution of partnerships upon certain events, and that a clarification of such laws is neces-

sary to the orderly administration of business in this State. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from the date of its passage and approval."

### RESEARCH REFERENCES

**ALR.** Dissolution of partnership: inability of partnership to operate at profit as justification. 20 A.L.R.4th 122.

Necessity that divorce court value property before distributing it. 51 A.L.R.4th 11.

**Am. Jur.** 59A Am. Jur. 2d, Partn., § 808 et seq.

**Ark. L. Rev.** Federal Tax Aspects of Partnership "Survival Insurance" Arrangements, 4 Ark. L. Rev. 187.

Legislation — No. 421 — Partnership — Agreement to Continue Beyond Death or Bankruptcy, 15 Ark. L. Rev. 440.

**C.J.S.** 68 C.J.S., Partn., § 302 et seq.

**U. Ark. Little Rock L.J.** Tyler, Survey of Business Law, 3 U. Ark. Little Rock L.J. 149.

Survey of Arkansas Law: Business Organizations, 6 U. Ark. Little Rock L.J. 83.

## 4-42-601 — 4-42-615. [Repealed.]

**Publisher's Notes.** Acts 1999, No. 1518, § 1204, provided: "Effective January 1, 2005, the following sections of the Arkansas Code are repealed: A.C.A. §§ 4-42-101 through 4-42-702."

. These sections, concerning dissolution and winding up, were repealed by Acts 1999, No. 1518, § 1204. The sections were derived from the following sources:

4-42-601. Acts 1941, No. 263, § 29; 1961, No. 421, § 1; A.S.A. 1947, § 65-129.

4-42-602. Acts 1941, No. 263, § 30; A.S.A. 1947, § 65-130.

4-42-603. Acts 1941, No. 263, § 31; 1961, No. 421, § 2; A.S.A. 1947, § 65-131.

4-42-604. Acts 1941, No. 263, § 32; A.S.A. 1947, § 65-132.

4-42-605. Acts 1941, No. 263, § 33; A.S.A. 1947, § 65-133.

4-42-606. Acts 1941, No. 263, § 34; A.S.A. 1947, § 65-134; Acts 1997, No. 912, § 6.

4-42-607. Acts 1941, No. 263, § 35; A.S.A. 1947, § 65-135.

4-42-608. Acts 1941, No. 263, § 36; A.S.A. 1947, § 65-136; Acts 1997, No. 912, § 7.

4-42-609. Acts 1941, No. 263, § 37; A.S.A. 1947, § 65-137.

4-42-610. Acts 1941, No. 263, § 38; A.S.A. 1947, § 65-138.

4-42-611. Acts 1941, No. 263, § 39; A.S.A. 1947, § 65-139.

4-42-612. Acts 1941, No. 263, § 40; A.S.A. 1947, § 65-140; Acts 1997, No. 912, § 8.

4-42-613. Acts 1941, No. 263, § 41; A.S.A. 1947, § 65-141.

4-42-614. Acts 1941, No. 263, § 42; A.S.A. 1947, § 65-142.

4-42-615. Acts 1941, No. 263, § 43; A.S.A. 1947, § 65-143.

## SUBCHAPTER 7 — MISCELLANEOUS PROVISIONS

### SECTION.

4-42-701. [Reserved.]

4-42-702. [Repealed.]

4-42-703 — 4-42-706. [Repealed.]

### SECTION.

4-42-707. Use of fictitious names.

4-42-708. Fees.

**Effective Dates.** Acts 1999, No. 1528, § 13: Apr. 15, 1999. Emergency clause provided: "It is hereby found and determined by the Eighty-second General Assembly that the Small Business Entity Tax Pass Through Act and the Revised Limited Partnership Act of 1991 and other related acts and related laws need amending in order to better reflect the intent and operation of those laws. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto. Notwithstanding the foregoing, Section 4 of this act shall only apply to limited liability companies in existence on

the effective date of this act in the event an election is made with the Secretary of State to have this provision apply; otherwise, the original § 4-32-802, as amended, shall apply to limited liability companies existing on the effective date of this act."

Acts 2007, No. 638, § 70: Sept. 1, 2007.

Acts 2007, No. 646, § 14: July 1, 2007. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that business entities are presently paying different fees for similar services from the Secretary of State; that this act will alleviate any undue hardship to any entity by standardizing business and commercial filing fees; and that this act is immediately necessary to aid the recordkeeping and accounting functions of the Secretary of State and should take effect at the beginning of the state's fiscal year. Therefore, an emergency is declared to exist and this act being necessary for the preservation of the public peace, health, and safety shall become effective on July 1, 2007."

## RESEARCH REFERENCES

**Ark. L. Notes.** Flaccus, Joint and Several Liability and Partnership Law, 2003 Arkansas L. Notes 79.

### 4-42-701. [Reserved.]

**Publisher's Notes.** Uniform Partnership Act (U.L.A.) § 44, which was not

adopted in Arkansas, is an effective date provision.

### 4-42-702. [Repealed.]

**Publisher's Notes.** Acts 1999, No. 1518, § 1204, provided: "Effective January 1, 2005, the following sections of the Arkansas Code are repealed: A.C.A. §§ 4-42-101 through 4-42-702."

This section, concerning legislation repealed, was repealed by Acts 1999, No. 1518, § 1204. The section was derived from Acts 1941, No. 263, § 44; A.S.A. 1947, § 65-143n.

**4-42-703 — 4-42-706. [Repealed.]**

**A.C.R.C. Notes.** The amendment to § 4-42-703 by Acts 2007, No. 646 was superseded by the repeal of § 4-42-703 by Acts 2007, No. 15. As amended by Acts 2007, No. 646, § 8, subdivision (a)(1)(C) of § 4-42-703 read as follows: “(C) The name and street address of a registered agent for service of process in this state, which the partnership shall be required to maintain”.

The amendment to § 4-42-705(d) and (e) by Acts 2007, No. 638, § 52 was superseded by the repeal of § 4-42-705 by Acts 2007, No. 15. As amended by Acts 2007, No. 638, § 52, subdivisions (d) and (e) of § 4-42-705 read as follows: “(d) Before transacting business in this state, a foreign registered limited liability partnership shall file a notice with the Secretary of State, on such forms as the Secretary of State shall provide, stating the name of the partnership, the jurisdiction the laws of which govern its partnership agreement and under which it is registered as a limited liability partnership, the address of its principal office, if the partnership’s principal office is not located in this state, the information required by § 4-20-105(a), a brief statement of the business in which the partnership engages, any other information that the partnership determines to include, and a statement that the

partnership is a registered limited liability partnership. Such notice shall be accompanied by a fee of three hundred dollars (\$300). Such notice shall be effective until withdrawn or cancelled. The filing of such notice with the Secretary of State shall make it unnecessary to file any other documents under § 4-70-201 et seq. (e) A foreign registered limited liability partnership shall file an amended notice within ninety (90) days of a change in its name, its registered office, or any of the information required by § 4-20-105(a). The amended notice shall be accompanied by a fee of fifty dollars (\$50.00).”

**Publisher’s Notes.** These sections, concerning registered limited liability partnerships, name of registered limited liability partnership, applicability of chapter to foreign and interstate commerce, and limited partnerships as registered limited liability limited partnerships, were repealed by Acts 2007, No. 15, § 8. The sections were derived from the following sources:

4-42-703. Acts 1997, No. 912, § 9.

4-42-704. Acts 1997, No. 912, § 9.

4-42-705. Acts 1997, No. 912, § 9.

4-42-706. Acts 1997, No. 912, § 9.

**Effective Dates.** Acts 2007, No. 638 § 70 provided: “Effective date. This act takes effect September 1, 2007.”

**4-42-707. Use of fictitious names.**

(a) No domestic or foreign registered limited liability partnership shall conduct any business in this state under a fictitious name unless it first files with the Secretary of State a form supplied or approved by the Secretary of State giving the following information:

(1) The fictitious name under which business is being or will be conducted by the applicant registered limited liability partnership;

(2) A brief statement of the character of business to be conducted under the fictitious name; and

(3) The name of the registered limited liability partnership, state of organization, and location, giving city and street address, of the registered office in the state of the applicant registered limited liability partnership.

(b) Each such form shall be executed, without verification, in duplicate and filed with the Secretary of State. The Secretary of State shall retain one (1) counterpart and the other counterpart, bearing the file marks of the Secretary of State, shall be returned to the registered limited liability partnership. However, the Secretary of State shall not

accept such filing if the proposed fictitious name is the same as, or confusingly similar to, the name of any domestic corporation, limited liability company, limited partnership, limited liability partnership, or any other entity registered with the Secretary of State, or any such foreign entity authorized to do business in the state or any name reserved or registered under § 4-27-402, § 4-27-403, § 4-32-104 or § 4-47-109.

(c) Copies of such filed forms, certified by the respective filing officers, shall be admitted in evidence where the question of filing may be material.

(d) If, after a filing under this section, the applicant registered limited liability partnership is dissolved, or, being a foreign registered limited liability partnership, surrenders or forfeits its rights to do business in Arkansas or, whether a domestic or foreign registered limited liability partnership, ceases to do business in Arkansas under the specified fictitious name, such registered limited liability partnership shall be obligated to file with the Secretary of State a cancellation of its privilege under this section. If such cancellation is not filed, the Secretary of State, upon satisfactory evidence, may cancel such privilege.

(e) If a registered limited liability partnership which has not filed under this section has heretofore or shall hereafter become a party to any contract, deed, conveyance, assignment, or instrument of encumbrance in which such registered limited liability partnership is referred to exclusively by a fictitious name, the obligations imposed upon such registered limited liability partnership under said instrument and the right sought to be conferred upon third parties thereunder may be enforced against it; but the rights accruing to such registered limited liability partnership under said instrument may not be enforced by the registered limited liability partnership in the courts of this state until it complies with this section and pays to the Treasurer of State a civil penalty of three hundred dollars (\$300), and in any suit by a registered limited liability partnership upon an instrument which identified it exclusively by a fictitious name, the registered limited liability partnership shall be required to allege compliance with this section.

(f) Compliance with this section does not give a registered limited liability partnership an exclusive right to the use of the fictitious name, and the registration of a fictitious name under this section will not bar the use of the same name as the name of any domestic entity or any foreign entity authorized to do business in this state. But this chapter is not intended to bar any aggrieved party, in such a situation, from applying for equitable relief under principles of fair trade law.

**History.** Acts 1999, No. 1528, § 5; 2007, No. 15, § 4.

**Publisher's Notes.** Acts 1999, No. 1528, § 9, provided: "The fictitious name provisions for limited liability companies, limited partnerships, and limited liability

partnerships in Sections 1, 3 and 5 of this act [codified as §§ 4-32-108, 4-43-108, 4-42-707] shall not be applicable to any name for which an assumed name filing has been made under § 4-70-203 prior to the effective date of this act."

**Amendments.** The 2007 amendment substituted “4-47-109” for “4-43-103” in (b).

**4-42-708. Fees.**

The Secretary of State shall collect the following fees when the documents described in this section are delivered to him or her by electronic means:

DOCUMENT	FEE	PROCESSING FEE
(1) Application for fictitious name for domestic limited liability partnership .....	\$9.50	....\$4.00
(2) Application for fictitious name for foreign limited liability partnership ..	\$9.50	....\$4.00
(3) Notice of change of registered office or agent or both .....		....No Fee
(4) For any other document not listed above, the cost for electronic filing is:		
(A) Four dollars (\$4.00) for the processing fee when the filing fee is \$0 to \$50;		
(B) Five dollars (\$5.00) for the processing fee when the filing fee is \$51 to \$99;		
(C) Ten dollars (\$10.00) for the processing fee when the filing fee is \$100 to \$299; and		
(D) Twelve dollars (\$12.00) for the processing fee when the filing fee is \$300 or more.		

**History.** Acts 2001, No. 1395, § 5; 2007, No. 646, § 9.

**RESEARCH REFERENCES**

**U. Ark. Little Rock L. Rev.** Survey of Legislation, 2001 Arkansas General Assembly, Business Law, 24 U. Ark. Little Rock L. Rev. 407.

**SUBCHAPTER 8 — CONVERSIONS, MERGERS, AND CONSOLIDATIONS**

SECTION.  
4-42-801 — 4-42-806. [Repealed.]

**4-42-801 — 4-42-806. [Repealed.]**

**Publisher’s Notes.** Former subchapter 8, concerning conversions, mergers, and consolidations, was repealed by Acts 2007, No. 15, § 9. The subchapter was derived from the following sources:  
4-42-801. Acts 1997, No. 479, § 4.  
4-42-802. Acts 1997, No. 479, § 4.

4-42-803. Acts 1997, No. 479, § 4.  
4-42-804. Acts 1997, No. 479, § 4.  
4-42-805. Acts 1997, No. 479, § 4.  
4-42-806. Acts 1997, No. 479, § 4.  
**Effective Dates.** Acts 2007, No. 15, § 9 states that §§ 4-42-801 — 806 are repealed effective September 1, 2007.

CHAPTER 43  
REVISED LIMITED PARTNERSHIP ACT OF 1991  
[REPEALED.]

SECTION.  
4-43-101 — 4-43-1206. [Repealed.]

**Effective Dates.** Acts 2007, No. 646, § 14: July 1, 2007. Emergency clause provided: “It is found and determined by the General Assembly of the State of Arkansas that business entities are presently paying different fees for similar services from the Secretary of State; that this act will alleviate any undue hardship to any entity by standardizing business and commercial filing fees; and that this act is

immediately necessary to aid the record-keeping and accounting functions of the Secretary of State and should take effect at the beginning of the state’s fiscal year. Therefore, an emergency is declared to exist and this act being necessary for the preservation of the public peace, health, and safety shall become effective on July 1, 2007.”

4-43-101 — 4-43-1206. [Repealed.]

**A.C.R.C. Notes.** The amendment to § 4-43-1104 by Acts 2007, No. 646 was superseded by the repeal of § 4-43-1104 by Acts 2007, No. 15. Acts 2007, No. 15, § 1, reenacted former § 4-43-1104 as § 4-47-1301. As amended by Acts 2007, No. 646, § 10, former § 4-43-1104 would read as follows: “(a) The Secretary of State shall collect the following fees when the documents described in this subsection are delivered to him or her for filing:

DOCUMENT	FEE
(1) Registration of certificate of limited partnership .....	\$ .50.00
Amendment of certificate of	
(2) limited partnership .....	15.00
	No
(3) Change of agent for service ....	Fee
Cancellation of certificate of	
(4) limited partnership .....	15.00
Assignment of limited partner-	
(5) ship interest .....	15.00
Withdrawal of general part-	
(6) ner .....	15.00
Admission of new general	
(7) partner .....	15.00
Merger or consolidation of lim-	
ited partnership with limited	
(8) liability company .....	15.00

DOCUMENT	FEE
(9) Dissolution of limited partner-	
ship .....	15.00
Registration of certificate of	
(10) foreign limited partnership ...	300.00
Amendment of certificate of	
(11) foreign limited partnership ....	15.00
Change of agent for service by	No
(12) foreign limited partnership.....	Fee
Cancellation of certificate of	
(13) foreign limited partnership.....	15.00
Assignment of foreign limited	
(14) partnership interest .....	15.00
Withdrawal of general partner	
by foreign limited partnership	
(15) .....	15.00
Admission of new general	
partner by foreign limited	
(16) partnership .....	15.00
Merger or consolidation of for-	
foreign limited partnership with	
(17) limited liability company .....	15.00
Withdrawal of foreign limited	No
(18) partnership .....	Fee

“(b)(1) The Secretary of State shall collect a fee of twenty-five dollars (\$25.00) each time process is served on him or her under this chapter. “(2) The party to a

proceeding causing service of process is entitled to recover the process fee as costs if the party prevails in the proceeding. “(c) The Secretary of State shall collect the following fees for copying and certifying the copy of any filed document relating to a domestic or foreign limited liability limited partnership: “(1) Fifty cents (\$.50) a page for copying; and “(2) Five dollars (\$5.00) for the certificate. “(d) The Secretary of State shall collect the following fees when the documents described in this subsection are delivered to him or her by electronic means:

- (1) Application for fictitious name for domestic limited partnership .....\$9.50 4.00
- Application for fictitious name of foreign limited partnership .....9.50 4.00
- (2) Notice of change of registered office or agent or .....No
- (3) both ..... Fee”

The amendment to § 4-43-1111 by Acts 2007, No. 646 was superseded by the repeal of § 4-43-1111 by Acts 2007, No. 15. Acts 2007, No. 15, § 1, reenacted former § 4-43-1111 as § 4-47-1302. As amended by Acts 2007, No. 646, § 11, former § 4-43-1111 would read as follows: “(a) The Secretary of State shall collect the following fees when the documents described in this subsection are delivered to him or her for filing:

- (1) Application for Registration of Limited Liability Limited Partnership .....\$. 50.00
- Amendment of Certificate of Limited Liability Limited Partnership (includes change or withdrawal of general partner) .....25.00
- (2) Change of registered agent or office ..... No Fee
- Restatement of Certificate of Limited Liability Limited Partnership .....25.00
- (4) Withdrawal of Domestic Limited Liability Limited Partnership .....25.00
- (5) Application for Certificate of Authority by Foreign Limited Liability Limited Partnership .....300.00
- (6)

- Application for Amended Certificate of Authority by Foreign Limited Liability Limited Partnership (includes change or withdrawal of general partner) .....300.00
- (7) Change of registered agent or office ..... No Fee
- (8) Application for Certificate of Withdrawal by Foreign Limited Liability Limited Partnership .....25.00
- (9) Application for Certificate of Existence or Authorization by Domestic Limited Liability Limited Partnership .....15.00
- (10) Application for Registration as a Domestic Limited Partnership and Domestic Limited Liability Limited Partnership ....50.00
- (11) Application for Registration as a Foreign Limited Partnership and Foreign Limited Liability Limited Partnership .....300.00
- (12) Any other document required or permitted to be filed by this chapter .....15.00
- (13)

“(b)(1) The Secretary of State shall collect a fee of twenty-five dollars (\$25.00) each time process is served on him or her under this section. “(2) The party to a proceeding causing service of process is entitled to recover the process fee as costs if the party prevails in the proceeding. “(c) The Secretary of State shall collect the following fees for copying and certifying the copy of any filed document relating to a domestic or foreign limited liability limited partnership: “(1) Fifty cents (50¢) a page for copying; and “(2) Five dollars (\$5.00) for the certificate.”

**Publisher’s Notes.** Former chapter 43, the Revised Limited Partnership Act of 1991, was repealed by Acts 2007, No. 15, § 10. The chapter was derived from the following sources:

- 4-43-101. Acts 1979, No. 657, Art. 1, § 101; A.S.A. 1947, § 65-501; Acts 1991, No. 1175, §§ 1, 2; 1997, No. 912, § 10.
- 4-43-102. Acts 1979, No. 657, Art. 1, § 102; A.S.A. 1947, § 65-502; Acts 1991, No. 1175, § 3; 1997, No. 399, § 1; 1997, No. 479, § 12.

- 4-43-103. Acts 1979, No. 657, Art. 1, § 103; A.S.A. 1947, § 65-503.
- 4-43-104. Acts 1979, No. 657, Art. 1, § 104; A.S.A. 1947, § 65-504.
- 4-43-105. Acts 1979, No. 657, Art. 1, § 105; A.S.A. 1947, § 65-505; Acts 1991, No. 1175, § 4.
- 4-43-106. Acts 1979, No. 657, Art. 1, § 106; A.S.A. 1947, § 65-506.
- 4-43-107. Acts 1979, No. 657, Art. 1, § 107; A.S.A. 1947, § 65-507.
- 4-43-108. Acts 1999, No. 1528, § 3.
- 4-43-201. Acts 1979, No. 657, Art. 2, § 201; A.S.A. 1947, § 65-508; Acts 1991, No. 1175, § 5.
- 4-43-202. Acts 1979, No. 657, Art. 2, § 202; A.S.A. 1947, § 65-509; Acts 1991, No. 1175, § 6.
- 4-43-203. Acts 1979, No. 657, Art. 2, § 203; A.S.A. 1947, § 65-510.
- 4-43-204. Acts 1979, No. 657, Art. 2, § 204; A.S.A. 1947, § 65-511; Acts 1991, No. 1175, § 7.
- 4-43-205. Acts 1979, No. 657, Art. 2, § 205; A.S.A. 1947, § 65-512; Acts 1991, No. 1175, § 8.
- 4-43-206. Acts 1979, No. 657, Art. 2, § 206; A.S.A. 1947, § 65-513.
- 4-43-207. Acts 1979, No. 657, Art. 2, § 207; A.S.A. 1947, § 65-514.
- 4-43-208. Acts 1979, No. 657, Art. 2, § 208; A.S.A. 1947, § 65-515; Acts 1991, No. 1175, § 9.
- 4-43-209. Acts 1979, No. 657, Art. 2, § 209; A.S.A. 1947, § 65-516; Acts 1991, No. 1175, § 10.
- 4-43-301. Acts 1979, No. 657, Art. 3, § 301; A.S.A. 1947, § 65-517; Acts 1991, No. 1175, § 11.
- 4-43-302. Acts 1979, No. 657, Art. 3, § 302; A.S.A. 1947, § 65-518; Acts 1993, No. 693, § 1.
- 4-43-303. Acts 1979, No. 657, Art. 3, § 303; A.S.A. 1947, § 65-519; Acts 1991, No. 1175, § 12.
- 4-43-304. Acts 1979, No. 657, Art. 3, § 304; 1985, No. 361, § 1; A.S.A. 1947, § 65-520; Acts 1991, No. 1175, § 13.
- 4-43-305. Acts 1979, No. 657, Art. 3, § 305; A.S.A. 1947, § 65-521.
- 4-43-401. Acts 1979, No. 657, Art. 4, § 401; A.S.A. 1947, § 65-522; Acts 1991, No. 1175, § 14.
- 4-43-402. Acts 1979, No. 657, Art. 4, § 402; A.S.A. 1947, § 65-523; Acts 1991, No. 1175, § 15.
- 4-43-403. Acts 1979, No. 657, Art. 4, § 403; 1985, No. 361, § 2; A.S.A. 1947, § 65-524.
- 4-43-404. Acts 1979, No. 657, Art. 4, § 404; A.S.A. 1947, § 65-525.
- 4-43-405. Acts 1979, No. 657, Art. 4, § 405; A.S.A. 1947, § 65-526.
- 4-43-501. Acts 1979, No. 657, Art. 5, § 501; A.S.A. 1947, § 65-527.
- 4-43-502. Acts 1979, No. 657, Art. 5, § 502; A.S.A. 1947, § 65-528; Acts 1991, No. 1175, § 16.
- 4-43-503. Acts 1979, No. 657, Art. 5, § 503; A.S.A. 1947, § 65-529; Acts 1991, No. 1175, § 17.
- 4-43-504. Acts 1979, No. 657, Art. 5, § 504; A.S.A. 1947, § 65-530; Acts 1991, No. 1175, § 18.
- 4-43-601. Acts 1979, No. 657, Art. 6, § 601; A.S.A. 1947, § 65-531; Acts 1991, No. 1175, § 19.
- 4-43-602. Acts 1979, No. 657, Art. 6, § 602; A.S.A. 1947, § 65-532.
- 4-43-603. Acts 1979, No. 657, Art. 6, § 603; A.S.A. 1947, § 65-533; Acts 1991, No. 1175, § 20.
- 4-43-604. Acts 1979, No. 657, Art. 6, § 604; A.S.A. 1947, § 65-534.
- 4-43-605. Acts 1979, No. 657, Art. 6, § 605; A.S.A. 1947, § 65-535; Acts 1991, No. 1175, § 21.
- 4-43-606. Acts 1979, No. 657, Art. 6, § 606; A.S.A. 1947, § 65-536.
- 4-43-607. Acts 1979, No. 657, Art. 6, § 607; A.S.A. 1947, § 65-537.
- 4-43-608. Acts 1979, No. 657, Art. 6, § 608; A.S.A. 1947, § 65-538; Acts 1991, No. 1175, § 22.
- 4-43-701. Acts 1979, No. 657, Art. 7, § 701; A.S.A. 1947, § 65-539.
- 4-43-702. Acts 1979, No. 657, Art. 7, § 702; A.S.A. 1947, § 65-540.
- 4-43-703. Acts 1979, No. 657, Art. 7, § 703; A.S.A. 1947, § 65-541.
- 4-43-704. Acts 1979, No. 657, Art. 7, § 704; A.S.A. 1947, § 65-542; Acts 1991, No. 1175, § 23.
- 4-43-705. Acts 1979, No. 657, Art. 7, § 705; A.S.A. 1947, § 65-543.
- 4-43-801. Acts 1979, No. 657, Art. 8, § 801; A.S.A. 1947, § 65-544; Acts 1991, No. 1175, § 24.
- 4-43-802. Acts 1979, No. 657, Art. 8, § 802; A.S.A. 1947, § 65-545.
- 4-43-803. Acts 1979, No. 657, Art. 8, § 803; A.S.A. 1947, § 65-546.
- 4-43-804. Acts 1979, No. 657, Art. 8, § 804; A.S.A. 1947, § 65-547.
- 4-43-901. Acts 1979, No. 657, Art. 9, § 901; A.S.A. 1947, § 65-548.

4-43-902. Acts 1979, No. 657, Art. 9, § 902; A.S.A. 1947, § 65-549; Acts 1991, No. 1175, § 25.

4-43-903. Acts 1979, No. 657, Art. 9, § 903; A.S.A. 1947, § 65-550.

4-43-904. Acts 1979, No. 657, Art. 9, § 904; A.S.A. 1947, § 65-551.

4-43-905. Acts 1979, No. 657, Art. 9, § 905; A.S.A. 1947, § 65-552.

4-43-906. Acts 1979, No. 657, Art. 9, § 906; A.S.A. 1947, § 65-553.

4-43-907. Acts 1979, No. 657, Art. 9, § 907; A.S.A. 1947, § 65-554.

4-43-908. Acts 1979, No. 657, Art. 9, § 908; A.S.A. 1947, § 65-555.

4-43-1001. Acts 1979, No. 657, Art. 10, § 1001; A.S.A. 1947, § 65-556.

4-43-1002. Acts 1979, No. 657, Art. 10, § 1002; A.S.A. 1947, § 65-557; Acts 1991, No. 1175, § 26.

4-43-1003. Acts 1979, No. 657, Art. 10, § 1003; A.S.A. 1947, § 65-558.

4-43-1004. Acts 1979, No. 657, Art. 10, § 1004; A.S.A. 1947, § 65-559.

4-43-1101. Acts 1979, No. 657, Art. 11, § 1101; A.S.A. 1947, § 65-560.

4-43-1102. Acts 1979, No. 657, Art. 11, § 1102; A.S.A. 1947, § 65-561; Acts 1991, No. 1175, § 27.

4-43-1103. Acts 1979, No. 657, Art. 11, § 1103; A.S.A. 1947, § 65-565n.

4-43-1104. Acts 1979, No. 657, Art. 11, § 1104; A.S.A. 1947, § 65-562; Acts 1987, No. 1068, § 3; 1999, No. 886, § 1; 2001, No. 1395, § 3.

4-43-1105. Acts 1979, No. 657, Art. 11, § 1105; A.S.A. 1947, § 65-563.

4-43-1106. Acts 1979, No. 657, Art. 11, § 1106; A.S.A. 1947, § 65-564.

4-43-1107. Acts 1979, No. 657, Art. 11, § 1107; A.S.A. 1947, § 65-565; Acts 2005, No. 1158, § 2.

4-43-1108. Acts 1979, No. 657, Art. 11, § 1108; A.S.A. 1947, § 65-566.

4-43-1109. Acts 1979, No. 657, Art. 11, § 1109; A.S.A. 1947, § 65-565n.

4-43-1110. Acts 1997, No. 912, § 11; 1999, No. 1528, § 6; 2005, No. 1158, § 3.

4-43-1111. Acts 1999, No. 887, § 1.

4-43-1201. Acts 1997, No. 479, § 5.

4-43-1202. Acts 1997, No. 479, § 5.

4-43-1203. Acts 1997, No. 479, § 5.

4-43-1204. Acts 1997, No. 479, § 5.

4-43-1205. Acts 1997, No. 479, § 5.

4-43-1206. Acts 1997, No. 479, § 5.

For present law, see Chapter 47, the Uniform Limited Partnership Act (2001), § 4-47-101 et seq.

**Effective Dates.** Acts 2007, No. 15, § 10 provides that §§ 4-43-101—4-43-1206 are repealed effective September 1, 2007.

## CHAPTER 44

### UNIFORM LIMITED PARTNERSHIP ACT

#### SECTION.

4-44-101 — 4-44-131. [Repealed.]

**A.C.R.C. Notes.** Former chapter 44, the Uniform Limited Partnership Act, regulated domestic limited partnerships. Chapter 43 of this title contains the Revised Limited Partnership Act, which became effective on July 1, 1979. Subchapters 1-8, 10 and 11 of chapter 43 also regulate domestic limited partnerships.

Section 4-43-1106 provides that a limited partnership formed under preexisting laws shall continue to be governed by the Uniform Limited Partnership Act [repealed] or Rev. Stat. Ch. 108 [repealed] unless it becomes a limited partnership under the Revised Limited Partnership Act [§ 4-43-101 et seq.]. However, the

Revised Limited Partnership Act does not otherwise refer to nor specifically repeal the Uniform Limited Partnership Act [repealed].

Acts 1991, No. 1175, § 28, provided, in part, that the repeal of this chapter does not impair, or otherwise affect, the organization or the continued existence of domestic limited partnerships existing on April 10, 1991, nor does the repeal of any existing code provision by that act impair any contract or affect any right accrued before April 10, 1991.

Acts 1991, No. 1175, § 29, provided that, unless otherwise agreed by the partners, the provisions of law in effect prior to

the effective date (July 1, 1979) of the Revised Limited Partnership Act of 1979 governing (i) allocation of profits and losses, (ii) distributions to a withdrawing partner, and (iii) distributions upon the

winding up of a limited partnership shall govern limited partnerships formed prior to the effective date of the Revised Limited Partnership Act of 1979.

#### 4-44-101 — 4-44-131. [Repealed.]

**Publisher's Notes.** This chapter was repealed by Acts 1991, No. 1175, § 28. The chapter was derived from the following sources:

§ 4-44-101. Acts 1953, No. 243, § 1; A.S.A. 1947, § 65-301.  
 § 4-44-102. Acts 1953, No. 243, § 2; 1977, No. 874, § 1; A.S.A. 1947, § 65-302.  
 § 4-44-103. Acts 1953, No. 243, § 3; A.S.A. 1947, § 65-303.  
 § 4-44-104. Acts 1953, No. 243, § 4; A.S.A. 1947, § 65-304.  
 § 4-44-105. Acts 1953, No. 243, § 5; A.S.A. 1947, § 65-305.  
 § 4-44-106. Acts 1953, No. 243, § 6; A.S.A. 1947, § 65-306.  
 § 4-44-107. Acts 1953, No. 243, § 7; A.S.A. 1947, § 65-307.  
 § 4-44-108. Acts 1953, No. 243, § 8; A.S.A. 1947, § 65-308.  
 § 4-44-109. Acts 1953, No. 243, § 9; A.S.A. 1947, § 65-309.  
 § 4-44-110. Acts 1953, No. 243, § 10; A.S.A. 1947, § 65-310.  
 § 4-44-111. Acts 1953, No. 243, § 11; A.S.A. 1947, § 65-311.  
 § 4-44-112. Acts 1953, No. 243, § 12; A.S.A. 1947, § 65-312.  
 § 4-44-113. Acts 1953, No. 243, § 13; A.S.A. 1947, § 65-313.  
 § 4-44-114. Acts 1953, No. 243, § 14; A.S.A. 1947, § 65-314.  
 § 4-44-115. Acts 1953, No. 243, § 15; A.S.A. 1947, § 65-315.

§ 4-44-116. Acts 1953, No. 243, § 16; A.S.A. 1947, § 65-316.  
 § 4-44-117. Acts 1953, No. 243, § 17; A.S.A. 1947, § 65-317.  
 § 4-44-118. Acts 1953, No. 243, § 18; A.S.A. 1947, § 65-318.  
 § 4-44-119. Acts 1953, No. 243, § 19; A.S.A. 1947, § 65-319.  
 § 4-44-120. Acts 1953, No. 243, § 20; A.S.A. 1947, § 65-320.  
 § 4-44-121. Acts 1953, No. 243, § 21; A.S.A. 1947, § 65-321.  
 § 4-44-122. Acts 1953, No. 243, § 22; A.S.A. 1947, § 65-322.  
 § 4-44-123. Acts 1953, No. 243, § 23; A.S.A. 1947, § 65-323.  
 § 4-44-124. Acts 1953, No. 243, § 24; A.S.A. 1947, § 65-324.  
 § 4-44-125. Acts 1953, No. 243, § 25; 1977, No. 874, § 2; A.S.A. 1947, § 65-325.  
 § 4-44-126. Acts 1953, No. 243, § 26; A.S.A. 1947, § 65-326.  
 § 4-44-127. Acts 1953, No. 243, § 27; A.S.A. 1947, § 65-327.  
 § 4-44-128. Acts 1953, No. 243, § 28; A.S.A. 1947, § 65-328.  
 § 4-44-129. Acts 1953, No. 243, § 29; A.S.A. 1947, § 65-329.  
 § 4-44-130. Acts 1953, No. 243, § 30; A.S.A. 1947, § 65-330.  
 § 4-44-131. Acts 1953, No. 243, § 31; A.S.A. 1947, § 65-331.

## CHAPTER 45

### FOREIGN LIMITED PARTNERSHIP ACT

#### SECTION.

4-45-101 — 4-45-110. [Repealed.]

**A.C.R.C. Notes.** This chapter, which became effective on March 27, 1979, contained the Foreign Limited Partnership

Act which regulated foreign limited partnerships. Chapter 43 of this title contains the Revised Limited Partnership Act

which became effective on July 1, 1979. Subchapter 9 of Chapter 43 also regulates foreign limited partnerships.

Acts 1991, No. 1175, § 28 provided, in part, that the repeal of this chapter does not impair, or otherwise affect, the organization or the continued existence of foreign limited partnerships existing on April 10, 1991, nor does the repeal of any existing Code provision by that act impair any contract or affect any right accrued before April 10, 1991.

Acts 1991, No. 1175, § 29 provided that, unless otherwise agreed by the partners, the provisions of law in effect prior to the effective date (July 1, 1979) of the Revised Limited Partnership Act of 1979 governing (i) allocation of profits and losses, (ii) distributions to a withdrawing partner, and (iii) distributions upon the winding up of a limited partnership shall govern limited partnerships formed prior to the effective date of the Revised Limited Partnership Act of 1979.

## 4-45-101 — 4-45-110. [Repealed.]

**Publisher's Notes.** This chapter was repealed by Acts 1991, No. 1175, § 28. The chapter was derived from the following sources:

§ 4-45-101. Acts 1979, No. 588, § 1; A.S.A. 1947, § 65-401.

§ 4-45-102. Acts 1979, No. 588, § 1; A.S.A. 1947, § 65-401.

§ 4-45-103. Acts 1979, No. 588, § 9; A.S.A. 1947, § 65-409.

§ 4-45-104. Acts 1979, No. 588, § 4; A.S.A. 1947, § 65-404.

§ 4-45-105. Acts 1979, No. 588, § 2; A.S.A. 1947, § 65-402.

§ 4-45-106. Acts 1979, No. 588, § 3; A.S.A. 1947, § 65-403.

§ 4-45-107. Acts 1979, No. 588, § 5; A.S.A. 1947, § 65-405.

§ 4-45-108. Acts 1979, No. 588, § 6; A.S.A. 1947, § 65-406.

§ 4-45-109. Acts 1979, No. 588, § 7; A.S.A. 1947, § 65-407.

§ 4-45-110. Acts 1979, No. 588, § 8; A.S.A. 1947, § 65-408.

## CHAPTER 46

### UNIFORM PARTNERSHIP ACT (1996)

#### SUBCHAPTER.

1. GENERAL PROVISIONS.
2. NATURE OF PARTNERSHIP.
3. RELATIONS OF PARTNERS TO PERSONS DEALING WITH PARTNERSHIP.
4. RELATIONS OF PARTNERS TO EACH OTHER AND TO PARTNERSHIP.
5. TRANSFEREES AND CREDITORS OF PARTNER.
6. PARTNER'S DISSOCIATION.
7. PARTNER'S DISSOCIATION WHEN BUSINESS NOT WOUND UP.
8. WINDING UP PARTNERSHIP BUSINESS.
9. CONVERSION AND MERGER.
10. LIMITED LIABILITY PARTNERSHIP.
11. FOREIGN LIMITED LIABILITY PARTNERSHIP.
12. MISCELLANEOUS PROVISIONS.

**Publisher's Notes.** Acts 1999, No. 1518, § 1204, provided: "Effective January 1, 2005, the following sections of the Arkansas Code are repealed: A.C.A. §§ 4-42-101 through 4-42-702."

Acts 1999, No. 1518, § 1205, provided: "(a) Before January 1, 2005, this chapter governs only a partnership formed:

"(1) after the effective date of this Act, unless that partnership is continuing the

business of a dissolved partnership under Section 41 of the prior Uniform Partnership Act; and

“(2) before the effective date of this Act, that elects, as provided by subsection (c), to be governed by this Act.

“(b) Beginning January 1, 2005, this Act governs all partnerships.

“(c) Before January 1, 2005, a partnership voluntarily may elect, in the manner provided in its partnership agreement or by law for amending the partnership

agreement, to be governed by this Act. The provisions of this Act relating to the liability of the partnership’s partners to third parties apply to limit those partners’ liability to a third party who had done business with the partnership within one year preceding the partnership’s election to be governed by this Act, only if the third party knows or has received a notification of the partnership’s election to be governed by this Act.”

## RESEARCH REFERENCES

**ALR.** Multi-state law partnership of professional service corporation, propriety of formation. 6 A.L.R.4th 1251.

Right of partners to assert personal privilege against self-incrimination with respect to production of partnership books or records. 17 A.L.R.4th 1039.

Joint venture’s capacity to sue. 56 A.L.R.4th 1234.

Ownership interest in employer business as affecting status as employee for

workers’ compensation purposes. 78 A.L.R.4th 973.

**Ark. L. Notes.** Goforth, Limited Liability for General Partners in Arkansas LLLP’s (Limited Liability Limited Partnerships), 2001 Ark. L. Notes 1.

Goforth, Time for Another New Business Statute: The Case for the Uniform Limited Partnership Act, 2004 Arkansas L. Notes 55.

## SUBCHAPTER 1 — GENERAL PROVISIONS

### SECTION.

4-46-101. Definitions.

4-46-102. Knowledge and notice.

4-46-103. Effect of partnership agreement — Nonwaivable provisions.

4-46-104. Supplemental principles of law.

### SECTION.

4-46-105. Execution, filing, and recording of statements.

4-46-106. Governing law.

4-46-107. Partnership subject to amendment or repeal of chapter.

### 4-46-101. Definitions.

(1) “Business” includes every trade, occupation, and profession.

(2) “Debtor in bankruptcy” means a person who is the subject of:

(i) an order for relief under Title 11 of the United States Code or a comparable order under a successor statute of general application; or

(ii) a comparable order under federal, state, or foreign law governing insolvency.

(3) “Distribution” means a transfer of money or other property from a partnership to a partner in the partner’s capacity as a partner or to the partner’s transferee.

(4) “Foreign limited liability partnership” means a partnership that:

(i) is formed under laws other than the laws of this state; and

(ii) has the status of a limited liability partnership under those laws.

(5) "Limited liability partnership" means a partnership that has filed a statement of qualification under § 4-46-1001 and does not have a similar statement in effect in any other jurisdiction.

(6) "Partnership" means an association of two (2) or more persons to carry on as co-owners a business for profit formed under § 4-46-202, predecessor law, or comparable law of another jurisdiction.

(7) "Partnership agreement" means the agreement, whether written, oral, or implied, among the partners concerning the partnership, including amendments to the partnership agreement.

(8) "Partnership at will" means a partnership in which the partners have not agreed to remain partners until the expiration of a definite term or the completion of a particular undertaking.

(9) "Partnership interest" or "partner's interest in the partnership" means all of a partner's interests in the partnership, including the partner's transferable interest and all management and other rights.

(10) "Person" means an individual, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(11) "Property" means all property, real, personal, or mixed, tangible or intangible, or any interest therein.

(12) "State" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or insular possession subject to the jurisdiction of the United States.

(13) "Statement" means a statement of partnership authority under § 4-46-303, a statement of denial under § 4-46-304, a statement of dissociation under § 4-46-704, a statement of dissolution under § 4-46-805, a statement of merger under § 4-46-908, a statement of qualification under § 4-46-1001, a statement of foreign qualification under § 4-46-1102, or an amendment or cancellation of any of the foregoing.

(14) "Transfer" includes an assignment, conveyance, lease, mortgage, deed, and encumbrance.

**History.** Acts 1999, No. 1518, § 101; substituted "§ 4-46-908" for "§4-46-907" 2009, No. 408, § 10. in (13).

**Amendments.** The 2009 amendment

## RESEARCH REFERENCES

**Ark. L. Rev.** A License to Lie, Cheat, Fiduciary Duties in Arkansas Limited Liability Companies, 60 Ark. L. Rev. 643. and Steal? Restriction or Elimination of

### 4-46-102. Knowledge and notice.

(a) A person knows a fact if the person has actual knowledge of it.

(b) A person has notice of a fact if the person:

(1) knows of it;

(2) has received a notification of it; or

(3) has reason to know it exists from all of the facts known to the person at the time in question.

(c) A person notifies or gives a notification to another by taking steps reasonably required to inform the other person in ordinary course, whether or not the other person learns of it.

(d) A person receives a notification when the notification:

(1) comes to the person's attention; or

(2) is duly delivered at the person's place of business or at any other place held out by the person as a place for receiving communications.

(e) Except as otherwise provided in subsection (f) of this section, a person other than an individual knows, has notice, or receives a notification of a fact for purposes of a particular transaction when the individual conducting the transaction knows, has notice, or receives a notification of the fact, or in any event when the fact would have been brought to the individual's attention if the person had exercised reasonable diligence. The person exercises reasonable diligence if it maintains reasonable routines for communicating significant information to the individual conducting the transaction and there is reasonable compliance with the routines. Reasonable diligence does not require an individual acting for the person to communicate information unless the communication is part of the individual's regular duties or the individual has reason to know of the transaction and that the transaction would be materially affected by the information.

(f) A partner's knowledge, notice, or receipt of a notification of a fact relating to the partnership is effective immediately as knowledge by, notice to, or receipt of a notification by the partnership, except in the case of a fraud on the partnership committed by or with the consent of that partner.

**History.** Acts 1999, No. 1518, § 102.

#### **4-46-103. Effect of partnership agreement — Nonwaivable provisions.**

(a) Except as otherwise provided in subsection (b) of this section, relations among the partners and between the partners and the partnership are governed by the partnership agreement. To the extent the partnership agreement does not otherwise provide, this chapter governs relations among the partners and between the partners and the partnership.

(b) The partnership agreement may not:

(1) vary the rights and duties under § 4-46-105 except to eliminate the duty to provide copies of statements to all of the partners;

(2) unreasonably restrict the right of access to books and records under § 4-46-403(b);

(3) eliminate the duty of loyalty under § 4-46-404(b) or § 4-46-603(b)(3), but:

(i) the partnership agreement may identify specific types or categories of activities that do not violate the duty of loyalty, if not manifestly unreasonable; or

- (ii) all of the partners or a number or percentage specified in the partnership agreement may authorize or ratify, after full disclosure of all material facts, a specific act or transaction that otherwise would violate the duty of loyalty;
- (4) unreasonably reduce the duty of care under § 4-46-404(c) or § 4-46-603(b)(3);
- (5) eliminate the obligation of good faith and fair dealing under § 4-46-404(d), but the partnership agreement may prescribe the standards by which the performance of the obligation is to be measured, if the standards are not manifestly unreasonable;
- (6) vary the power to dissociate as a partner under § 4-46-602(a), except to require the notice under § 4-46-601(1) to be in writing;
- (7) vary the right of a court to expel a partner in the events specified in § 4-46-601(5);
- (8) vary the requirement to wind up the partnership business in cases specified in § 4-46-801(4), (5), or (6);
- (9) vary the law applicable to a limited liability partnership under § 4-46-106(b); or
- (10) restrict rights of third parties under this chapter.

**History.** Acts 1999, No. 1518, § 103.

#### **4-46-104. Supplemental principles of law.**

(a) Unless displaced by particular provisions of this chapter, the principles of law and equity supplement this chapter.

(b) If an obligation to pay interest arises under this chapter and the rate is not specified, the rate shall be six percent (6%).

**History.** Acts 1999, No. 1518, § 104.

#### **4-46-105. Execution, filing, and recording of statements.**

(a) A statement may be filed in the office of the Secretary of State. A certified copy of a statement that is filed in an office in another State may be filed in the office of the Secretary of State. Either filing has the effect provided in this chapter with respect to partnership property located in or transactions that occur in this State.

(b) A certified copy of a statement that has been filed in the office of the Secretary of State and recorded in the office for recording transfers of real property has the effect provided for recorded statements in this chapter. A recorded statement that is not a certified copy of a statement filed in the office of the Secretary of State does not have the effect provided for recorded statements in this chapter.

(c) A statement filed by a partnership must be executed by at least two (2) partners. Other statements must be executed by a partner or other person authorized by this chapter. An individual who executes a statement as, or on behalf of, a partner or other person named as a partner in a statement shall personally declare under penalty of perjury that the contents of the statement are accurate.

(d) A person authorized by this chapter to file a statement may amend or cancel the statement by filing an amendment or cancellation that names the partnership, identifies the statement, and states the substance of the amendment or cancellation.

(e) A person who files a statement pursuant to this section shall promptly send a copy of the statement to every nonfiling partner and to any other person named as a partner in the statement. Failure to send a copy of a statement to a partner or other person does not limit the effectiveness of the statement as to a person not a partner.

(f) The Secretary of State shall collect a fee for filing or providing a certified copy of a statement. The officer responsible for recording transfers of real property may collect a fee for recording a statement.

**History.** Acts 1999, No. 1518, § 105.

**4-46-106. Governing law.**

(a) Except as otherwise provided in subsection (b) of this section, the law of the jurisdiction in which a partnership has its chief executive office governs relations among the partners and between the partners and the partnership.

(b) The law of this State governs relations among the partners and between the partners and the partnership and the liability of partners for an obligation of a limited liability partnership.

**History.** Acts 1999, No. 1518, § 106.

**4-46-107. Partnership subject to amendment or repeal of chapter.**

A partnership governed by this chapter is subject to any amendment to or repeal of this chapter.

**History.** Acts 1999, No. 1518, § 107.

**SUBCHAPTER 2 — NATURE OF PARTNERSHIP**

SECTION.

- 4-46-201. Partnership as entity.
- 4-46-202. Formation of partnership.
- 4-46-203. Partnership property.

SECTION.

- 4-46-204. When property is partnership property.

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**RESEARCH REFERENCES**

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| <b>ALR.</b> Civil liability of one partner to another or to the partnership based on partner's personal purchase of partner- | ship property during existence of partnership. 37 A.L.R.4th 494. |
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**4-46-201. Partnership as entity.**

- (a) A partnership is an entity distinct from its partners.
- (b) A limited liability partnership continues to be the same entity that existed before the filing of a statement of qualification under § 4-46-1001.

**History.** Acts 1999, No. 1518, § 201.

**4-46-202. Formation of partnership.**

(a) Except as otherwise provided in subsection (b) of this section, the association of two (2) or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership.

(b) An association formed under a statute other than this chapter, a predecessor statute, or a comparable statute of another jurisdiction is not a partnership under this chapter.

(c) In determining whether a partnership is formed, the following rules apply:

(1) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not by itself establish a partnership, even if the co-owners share profits made by the use of the property.

(2) The sharing of gross returns does not by itself establish a partnership, even if the persons sharing them have a joint or common right or interest in property from which the returns are derived.

(3) A person who receives a share of the profits of a business is presumed to be a partner in the business, unless the profits were received in payment:

- (i) of a debt by installments or otherwise;
- (ii) for services as an independent contractor or of wages or other compensation to an employee;
- (iii) of rent;
- (iv) of an annuity or other retirement or health benefit to a beneficiary, representative, or designee of a deceased or retired partner;
- (v) of interest or other charge on a loan, even if the amount of payment varies with the profits of the business, including a direct or indirect present or future ownership of the collateral, or rights to income, proceeds, or increase in value derived from the collateral; or
- (vi) for the sale of the goodwill of a business or other property by installments or otherwise.

**History.** Acts 1999, No. 1518, § 202.

**4-46-203. Partnership property.**

Property acquired by a partnership is property of the partnership and not of the partners individually.

**History.** Acts 1999, No. 1518, § 203.

**4-46-204. When property is partnership property.**

(a) Property is partnership property if acquired in the name of:

- (1) the partnership; or
- (2) one (1) or more partners with an indication in the instrument transferring title to the property of the person's capacity as a partner or of the existence of a partnership but without an indication of the name of the partnership.

(b) Property is acquired in the name of the partnership by a transfer to:

- (1) the partnership in its name; or
- (2) one (1) or more partners in their capacity as partners in the partnership, if the name of the partnership is indicated in the instrument transferring title to the property.

(c) Property is presumed to be partnership property if purchased with partnership assets, even if not acquired in the name of the partnership or of one (1) or more partners with an indication in the instrument transferring title to the property of the person's capacity as a partner or of the existence of a partnership.

(d) Property acquired in the name of one (1) or more of the partners, without an indication in the instrument transferring title to the property of the person's capacity as a partner or of the existence of a partnership and without use of partnership assets, is presumed to be separate property, even if used for partnership purposes.

**History.** Acts 1999, No. 1518, § 204.

**CASE NOTES****ANALYSIS**

Intent of Partners.  
Partnership Property.

**Intent of Partners.**

A partnership consisting of Chapter 7 debtors was the owner of the collateral used to secure debt owed to creditors and had sufficient rights in all of the collateral for the security interests to attach and become enforceable, as required by § 4-9-203(a), at the time the security interests were granted because the debtors intended for the collateral to be owned by the partnership. *In re Curtis*, 363 B.R. 572 (Bankr. E.D. Ark. 2007).

**Partnership Property.**

Land that was owned by the individual partners, all members of the same family, that was never formally deeded to the partnership did not preclude the partnership from acting as a landlord for the property with the ability to enter into a lease agreement and to enforce a lien for rent under § 18-41-101 when the evidence established the owners' intent to have the partnership act accordingly. *Bank of McCrory v. Morrison (In re James)*, 368 B.R. 800 (Bankr. E.D. Ark. 2007).

### SUBCHAPTER 3 — RELATIONS OF PARTNERS TO PERSONS DEALING WITH PARTNERSHIP

**SECTION.**

- 4-46-301. Partner agent of partnership.  
4-46-302. Transfer of partnership property.  
4-46-303. Statement of partnership authority.  
4-46-304. Statement of denial.

**SECTION.**

- 4-46-305. Partnership liable for partner's actionable conduct.  
4-46-306. Partner's liability.  
4-46-307. Actions by and against partnership and partners.  
4-46-308. Liability of purported partner.

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### RESEARCH REFERENCES

**ALR.** Rights of attorneys leaving firm with respect to firm clients. 1 A.L.R.4th 1164.

Derivative liability of partner for punitive damages for wrongful act. 14 A.L.R.4th 1335.

Right of partner to assert privilege against self-incrimination with respect to production of partnership books or records. 17 A.L.R.4th 1039.

Professional services within meaning of

statute preserving individual liability of professional employees of professional corporation, association, or partnership. 31 A.L.R.4th 898.

Form of business organization of successor or predecessor as affecting successor liability. 32 A.L.R.4th 196.

Ownership interest in employer business as affecting status as employee for worker's compensation purposes. 78 A.L.R.4th 973.

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#### 4-46-301. Partner agent of partnership.

Subject to the effect of a statement of partnership authority under § 4-46-303:

(1) Each partner is an agent of the partnership for the purpose of its business. An act of a partner, including the execution of an instrument in the partnership name, for apparently carrying on in the ordinary course the partnership business or business of the kind carried on by the partnership binds the partnership, unless the partner had no authority to act for the partnership in the particular matter and the person with whom the partner was dealing knew or had received a notification that the partner lacked authority.

(2) An act of a partner which is not apparently for carrying on in the ordinary course the partnership business or business of the kind carried on by the partnership binds the partnership only if the act was authorized by the other partners.

**History.** Acts 1999, No. 1518, § 301.

#### 4-46-302. Transfer of partnership property.

(a) Partnership property may be transferred as follows:

(1) Subject to the effect of a statement of partnership authority under § 4-46-303, partnership property held in the name of the

partnership may be transferred by an instrument of transfer executed by a partner in the partnership name.

(2) Partnership property held in the name of one (1) or more partners with an indication in the instrument transferring the property to them of their capacity as partners or of the existence of a partnership, but without an indication of the name of the partnership, may be transferred by an instrument of transfer executed by the persons in whose name the property is held.

(3) Partnership property held in the name of one (1) or more persons other than the partnership, without an indication in the instrument transferring the property to them of their capacity as partners or of the existence of a partnership, may be transferred by an instrument of transfer executed by the persons in whose name the property is held.

(b) A partnership may recover partnership property from a transferee only if it proves that execution of the instrument of initial transfer did not bind the partnership under § 4-46-301 and:

(1) as to a subsequent transferee who gave value for property transferred under subdivision (a)(1) and (2) of this section, proves that the subsequent transferee knew or had received a notification that the person who executed the instrument of initial transfer lacked authority to bind the partnership; or

(2) as to a transferee who gave value for property transferred under subdivision (a)(3) of this section, proves that the transferee knew or had received a notification that the property was partnership property and that the person who executed the instrument of initial transfer lacked authority to bind the partnership.

(c) A partnership may not recover partnership property from a subsequent transferee if the partnership would not have been entitled to recover the property, under subsection (b) of this section, from any earlier transferee of the property.

(d) If a person holds all of the partners' interests in the partnership, all of the partnership property vests in that person. The person may execute a document in the name of the partnership to evidence vesting of the property in that person and may file or record the document.

**History.** Acts 1999, No. 1518, § 302.

#### **4-46-303. Statement of partnership authority.**

(a) A partnership may file a statement of partnership authority, which:

(1) must include:

(i) the name of the partnership;

(ii) the street address of its chief executive office and of one (1) office in this State, if there is one;

(iii) the names and mailing addresses of all of the partners or of an agent appointed and maintained by the partnership for the purpose of subsection (b) of this section; and

(iv) the names of the partners authorized to execute an instrument transferring real property held in the name of the partnership; and  
(2) may state the authority, or limitations on the authority, of some or all of the partners to enter into other transactions on behalf of the partnership and any other matter.

(b) If a statement of partnership authority names an agent, the agent shall maintain a list of the names and mailing addresses of all of the partners and make it available to any person on request for good cause shown.

(c) If a filed statement of partnership authority is executed pursuant to § 4-46-105(c) and states the name of the partnership but does not contain all of the other information required by subsection (a) of this section, the statement nevertheless operates with respect to a person not a partner as provided in subsections (d) and (e) of this section.

(d) Except as otherwise provided in subsection (g) of this section, a filed statement of partnership authority supplements the authority of a partner to enter into transactions on behalf of the partnership as follows:

(1) Except for transfers of real property, a grant of authority contained in a filed statement of partnership authority is conclusive in favor of a person who gives value without knowledge to the contrary, so long as and to the extent that a limitation on that authority is not then contained in another filed statement. A filed cancellation of a limitation on authority revives the previous grant of authority.

(2) A grant of authority to transfer real property held in the name of the partnership contained in a certified copy of a filed statement of partnership authority recorded in the office for recording transfers of that real property is conclusive in favor of a person who gives value without knowledge to the contrary, so long as and to the extent that a certified copy of a filed statement containing a limitation on that authority is not then of record in the office for recording transfers of that real property. The recording in the office for recording transfers of that real property of a certified copy of a filed cancellation of a limitation on authority revives the previous grant of authority.

(e) A person not a partner is deemed to know of a limitation on the authority of a partner to transfer real property held in the name of the partnership if a certified copy of the filed statement containing the limitation on authority is of record in the office for recording transfers of that real property.

(f) Except as otherwise provided in subsections (d) and (e) of this section and §§ 4-46-704 and 4-46-805, a person not a partner is not deemed to know of a limitation on the authority of a partner merely because the limitation is contained in a filed statement.

(g) Unless earlier canceled, a filed statement of partnership authority is canceled by operation of law five (5) years after the date on which the statement, or the most recent amendment, was filed with the Secretary of State.

**History.** Acts 1999, No. 1518, § 303.

#### **4-46-304. Statement of denial.**

A partner or other person named as a partner in a filed statement of partnership authority or in a list maintained by an agent pursuant to § 4-46-303(b) may file a statement of denial stating:

- (1) The name of the partnership;
- (2) The name of the person filing the denial; and
- (3) The fact that is being denied which may include denial of a person's authority or status as a partner. A statement of denial is a limitation on authority as provided in § 4-46-303(d) and (e).

**History.** Acts 1999, No. 1518, § 304.

#### **4-46-305. Partnership liable for partner's actionable conduct.**

(a) A partnership is liable for loss or injury caused to a person, or for a penalty incurred, as a result of a wrongful act or omission, or other actionable conduct, of a partner acting in the ordinary course of business of the partnership or with authority of the partnership.

(b) If, in the course of the partnership's business or while acting with authority of the partnership, a partner receives or causes the partnership to receive money or property of a person not a partner, and the money or property is misapplied by a partner, the partnership is liable for the loss.

**History.** Acts 1999, No. 1518, § 305.

#### **4-46-306. Partner's liability.**

(a) Except as otherwise provided in subsections (b) and (c) of this section, all partners are liable jointly and severally for all obligations of the partnership unless otherwise agreed by the claimant or provided by law.

(b) A person admitted as a partner into an existing partnership is not personally liable for any partnership obligation incurred before the person's admission as a partner.

(c) An obligation of a partnership incurred while the partnership is a limited liability partnership, whether arising in contract, tort, or otherwise, is solely the obligation of the partnership. A partner is not personally liable, directly or indirectly, by way of contribution or otherwise, for such a partnership obligation solely by reason of being or so acting as a partner. This subsection applies notwithstanding anything inconsistent in the partnership agreement that existed immediately before the vote required to become a limited liability partnership under § 4-46-1001(b).

**History.** Acts 1999, No. 1518, § 306.

**RESEARCH REFERENCES**

**Ark. L. Notes.** Flaccus, Joint and Several Liability and Partnership Law, 2003 Arkansas L. Notes 79.

**CASE NOTES****Joint and Several Liability.**

Alter ego theory was rejected as a basis for a finding of personal liability on the part of a Chapter 7 debtor who allegedly controlled certain entities organized as partnerships under Arkansas law because

state law already provided that the partners, pursuant to subsection (a) of this section, were individually liable for partnership debts in any case. *Southern Bancorp South v. Richmond (In re Richmond)*, 430 B.R. 846 (Bankr. E.D. Ark. 2010).

**4-46-307. Actions by and against partnership and partners.**

(a) A partnership may sue and be sued in the name of the partnership.

(b) An action may be brought against the partnership and, to the extent not inconsistent with § 4-46-306, any or all of the partners in the same action or in separate actions.

(c) A judgment against a partnership is not by itself a judgment against a partner. A judgment against a partnership may not be satisfied from a partner's assets unless there is also a judgment against the partner.

(d) A judgment creditor of a partner may not levy execution against the assets of the partner to satisfy a judgment based on a claim against the partnership unless the partner is personally liable for the claim under § 4-46-306 and:

(1) a judgment based on the same claim has been obtained against the partnership and a writ of execution on the judgment has been returned unsatisfied in whole or in part;

(2) the partnership is a debtor in bankruptcy;

(3) the partner has agreed that the creditor need not exhaust partnership assets;

(4) a court grants permission to the judgment creditor to levy execution against the assets of a partner based on a finding that partnership assets subject to execution are clearly insufficient to satisfy the judgment, that exhaustion of partnership assets is excessively burdensome, or that the grant of permission is an appropriate exercise of the court's equitable powers; or

(5) liability is imposed on the partner by law or contract independent of the existence of the partnership.

(e) This section applies to any partnership liability or obligation resulting from a representation by a partner or purported partner under § 4-46-308.

**History.** Acts 1999, No. 1518, § 307.

**4-46-308. Liability of purported partner.**

(a) If a person, by words or conduct, purports to be a partner, or consents to being represented by another as a partner, in a partnership or with one (1) or more persons not partners, the purported partner is liable to a person to whom the representation is made, if that person, relying on the representation, enters into a transaction with the actual or purported partnership. If the representation, either by the purported partner or by a person with the purported partner's consent, is made in a public manner, the purported partner is liable to a person who relies upon the purported partnership even if the purported partner is not aware of being held out as a partner to the claimant. If partnership liability results, the purported partner is liable with respect to that liability as if the purported partner were a partner. If no partnership liability results, the purported partner is liable with respect to that liability jointly and severally with any other person consenting to the representation.

(b) If a person is thus represented to be a partner in an existing partnership, or with one or more persons not partners, the purported partner is an agent of persons consenting to the representation to bind them to the same extent and in the same manner as if the purported partner were a partner, with respect to persons who enter into transactions in reliance upon the representation. If all of the partners of the existing partnership consent to the representation, a partnership act or obligation results. If fewer than all of the partners of the existing partnership consent to the representation, the person acting and the partners consenting to the representation are jointly and severally liable.

(c) A person is not liable as a partner merely because the person is named by another in a statement of partnership authority.

(d) A person does not continue to be liable as a partner merely because of a failure to file a statement of dissociation or to amend a statement of partnership authority to indicate the partner's dissociation from the partnership.

(e) Except as otherwise provided in subsections (a) and (b) of this section, persons who are not partners as to each other are not liable as partners to other persons.

**History.** Acts 1999, No. 1518, § 308.

**CASE NOTES****Liability.**

This section did not require that a Chapter 7 debtor be considered a de facto partner of a partnership and thus liable on the partnership's debt to a creditor because the creditor knew from the inception of the loan that the debtor was not a

partner of the partnership and accepted the risk that the partnership, not the debtor, would repay the loan. *Southern Bancorp South v. Richmond (In re Richmond)*, 430 B.R. 846 (Bankr. E.D. Ark. 2010).

## SUBCHAPTER 4 — RELATIONS OF PARTNERS TO EACH OTHER AND TO PARTNERSHIP

### SECTION.

4-46-401. Partner's rights and duties.

4-46-402. Distributions in kind.

4-46-403. Partner's rights and duties with respect to information.

4-46-404. General standards of partner's conduct.

### SECTION.

4-46-405. Actions by partnership and partners.

4-46-406. Continuation of partnership beyond definite term or particular undertaking.

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## RESEARCH REFERENCES

**ALR.** Breach of fiduciary duty to copartner on sale of partnership interest to another partner. 4 A.L.R.4th 1122.

Contractual restriction on right of accountant to practice, incident to sale or withdraw from accountancy partnership. 13 A.L.R.4th 661.

Derivative liability of partner for punitive damages for wrongful act. 14 A.L.R.4th 1335.

Right of partner to assert privilege against self-incrimination with respect to production of partnership books or records. 17 A.L.R.4th 1039.

Civil liability of one partner to another

or to the partnership based on partner's personal purchase of partnership property during existence of partnership. 37 A.L.R.4th 494.

Tort action for personal injury or property damage by partner against another partner or the partnership. 39 A.L.R.4th 139.

When statute of limitations commences to run on right of partnership accounting. 44 A.L.R.4th 678.

Enforceability of agreement restricting right of attorney to compete with former law firm. 28 A.L.R.5th 420.

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### 4-46-401. Partner's rights and duties.

(a) Each partner is deemed to have an account that is:

(1) credited with an amount equal to the money plus the value of any other property, net of the amount of any liabilities, the partner contributes to the partnership and the partner's share of the partnership profits; and

(2) charged with an amount equal to the money plus the value of any other property, net of the amount of any liabilities, distributed by the partnership to the partner and the partner's share of the partnership losses.

(b) Each partner is entitled to an equal share of the partnership profits and is chargeable with a share of the partnership losses in proportion to the partner's share of the profits.

(c) A partnership shall reimburse a partner for payments made and indemnify a partner for liabilities incurred by the partner in the ordinary course of the business of the partnership or for the preservation of its business or property.

(d) A partnership shall reimburse a partner for an advance to the partnership beyond the amount of capital the partner agreed to contribute.

(e) A payment or advance made by a partner which gives rise to a partnership obligation under subsection (c) or (d) of this section constitutes a loan to the partnership which accrues interest from the date of the payment or advance.

(f) Each partner has equal rights in the management and conduct of the partnership business.

(g) A partner may use or possess partnership property only on behalf of the partnership.

(h) A partner is not entitled to remuneration for services performed for the partnership, except for reasonable compensation for services rendered in winding up the business of the partnership.

(i) A person may become a partner only with the consent of all of the partners.

(j) A difference arising as to a matter in the ordinary course of business of a partnership may be decided by a majority of the partners. An act outside the ordinary course of business of a partnership and an amendment to the partnership agreement may be undertaken only with the consent of all of the partners.

(k) This section does not affect the obligations of a partnership to other persons under § 4-46-301.

**History.** Acts 1999, No. 1518, § 401.

#### **4-46-402. Distributions in kind.**

A partner has no right to receive, and may not be required to accept, a distribution in kind.

**History.** Acts 1999, No. 1518, § 402.

#### **4-46-403. Partner's rights and duties with respect to information.**

(a) A partnership shall keep its books and records, if any, at its chief executive office.

(b) A partnership shall provide partners and their agents and attorneys access to its books and records. It shall provide former partners and their agents and attorneys access to books and records pertaining to the period during which they were partners. The right of access provides the opportunity to inspect and copy books and records during ordinary business hours. A partnership may impose a reasonable charge, covering the costs of labor and material, for copies of documents furnished.

(c) Each partner and the partnership shall furnish to a partner, and to the legal representative of a deceased partner or partner under legal disability:

(1) without demand, any information concerning the partnership's business and affairs reasonably required for the proper exercise of the partner's rights and duties under the partnership agreement or this chapter; and

(2) on demand, any other information concerning the partnership's business and affairs, except to the extent the demand or the information demanded is unreasonable or otherwise improper under the circumstances.

**History.** Acts 1999, No. 1518, § 403.

#### **4-46-404. General standards of partner's conduct.**

(a) The only fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care set forth in subsections (b) and (c) of this section.

(b) A partner's duty of loyalty to the partnership and the other partners is limited to the following:

(1) to account to the partnership and hold as trustee for it any property, profit, or benefit derived by the partner in the conduct and winding up of the partnership business or derived from a use by the partner of partnership property, including the appropriation of a partnership opportunity;

(2) to refrain from dealing with the partnership in the conduct or winding up of the partnership business as or on behalf of a party having an interest adverse to the partnership; and

(3) to refrain from competing with the partnership in the conduct of the partnership business before the dissolution of the partnership.

(c) A partner's duty of care to the partnership and the other partners in the conduct and winding up of the partnership business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.

(d) A partner shall discharge the duties to the partnership and the other partners under this chapter or under the partnership agreement and exercise any rights consistently with the obligation of good faith and fair dealing.

(e) A partner does not violate a duty or obligation under this chapter or under the partnership agreement merely because the partner's conduct furthers the partner's own interest.

(f) A partner may lend money to and transact other business with the partnership, and as to each loan or transaction the rights and obligations of the partner are the same as those of a person who is not a partner, subject to other applicable law.

(g) This section applies to a person winding up the partnership business as the personal or legal representative of the last surviving partner as if the person were a partner.

**History.** Acts 1999, No. 1518, § 404.

#### **4-46-405. Actions by partnership and partners.**

(a) A partnership may maintain an action against a partner for a breach of the partnership agreement, or for the violation of a duty to the partnership, causing harm to the partnership.

(b) A partner may maintain an action against the partnership or another partner for legal or equitable relief, with or without an accounting as to partnership business, to:

(1) enforce the partner's rights under the partnership agreement;

(2) enforce the partner's rights under this chapter, including:

(i) the partner's rights under §§ 4-46-401, 4-46-403, or 4-46-404;

(ii) the partner's right on dissociation to have the partner's interest in the partnership purchased pursuant to § 4-46-701 or enforce any other right under § 4-46-601 et seq. or § 4-46-701 et seq.; or

(iii) the partner's right to compel a dissolution and winding up of the partnership business under § 4-46-801 or enforce any other right under § 4-46-801 et seq.; or

(3) enforce the rights and otherwise protect the interests of the partner, including rights and interests arising independently of the partnership relationship.

(c) The accrual of, and any time limitation on, a right of action for a remedy under this section is governed by other law. A right to an accounting upon a dissolution and winding up does not revive a claim barred by law.

**History.** Acts 1999, No. 1518, § 405.

#### **4-46-406. Continuation of partnership beyond definite term or particular undertaking.**

(a) If a partnership for a definite term or particular undertaking is continued, without an express agreement, after the expiration of the term or completion of the undertaking, the rights and duties of the partners remain the same as they were at the expiration or completion, so far as is consistent with a partnership at will.

(b) If the partners, or those of them who habitually acted in the business during the term or undertaking, continue the business without any settlement or liquidation of the partnership, they are presumed to have agreed that the partnership will continue.

**History.** Acts 1999, No. 1518, § 406.

### **SUBCHAPTER 5 — TRANSFEREES AND CREDITORS OF PARTNER**

#### **SECTION.**

4-46-501. Partner not co-owner of partnership property.

4-46-502. Partner's transferable interest in partnership.

#### **SECTION.**

4-46-503. Transfer of partner's transferable interest.

4-46-504. Partner's transferable interest subject to charging order.

**4-46-501. Partner not co-owner of partnership property.**

A partner is not a co-owner of partnership property and has no interest in partnership property which can be transferred, either voluntarily or involuntarily.

**History.** Acts 1999, No. 1518, § 501.

**4-46-502. Partner's transferable interest in partnership.**

The only transferable interest of a partner in the partnership is the partner's share of the profits and losses of the partnership and the partner's right to receive distributions. The interest is personal property.

**History.** Acts 1999, No. 1518, § 502.

**4-46-503. Transfer of partner's transferable interest.**

(a) A transfer, in whole or in part, of a partner's transferable interest in the partnership:

- (1) is permissible;
- (2) does not by itself cause the partner's dissociation or a dissolution and winding up of the partnership business; and
- (3) does not, as against the other partners or the partnership, entitle the transferee, during the continuance of the partnership, to participate in the management or conduct of the partnership business, to require access to information concerning partnership transactions, or to inspect or copy the partnership books or records.

(b) A transferee of a partner's transferable interest in the partnership has a right:

- (1) to receive, in accordance with the transfer, distributions to which the transferor would otherwise be entitled;
- (2) to receive upon the dissolution and winding up of the partnership business, in accordance with the transfer, the net amount otherwise distributable to the transferor; and
- (3) to seek under § 4-46-801(6) a judicial determination that it is equitable to wind up the partnership business.

(c) In a dissolution and winding up, a transferee is entitled to an account of partnership transactions only from the date of the latest account agreed to by all of the partners.

(d) Upon transfer, the transferor retains the rights and duties of a partner other than the interest in distributions transferred.

(e) A partnership need not give effect to a transferee's rights under this section until it has notice of the transfer.

(f) A transfer of a partner's transferable interest in the partnership in violation of a restriction on transfer contained in the partnership agreement is ineffective as to a person having notice of the restriction at the time of transfer.

**History.** Acts 1999, No. 1518, § 503.

#### **4-46-504. Partner's transferable interest subject to charging order.**

(a) On application by a judgment creditor of a partner or of a partner's transferee, a court having jurisdiction may charge the transferable interest of the judgment debtor to satisfy the judgment. The court may appoint a receiver of the share of the distributions due or to become due to the judgment debtor in respect of the partnership and make all other orders, directions, accounts, and inquiries the judgment debtor might have made or which the circumstances of the case may require.

(b) A charging order constitutes a lien on the judgment debtor's transferable interest in the partnership. The court may order a foreclosure of the interest subject to the charging order at any time. The purchaser at the foreclosure sale has the rights of a transferee.

(c) At any time before foreclosure, an interest charged may be redeemed:

- (1) by the judgment debtor;
- (2) with property other than partnership property, by one (1) or more of the other partners; or
- (3) with partnership property, by one (1) or more of the other partners with the consent of all of the partners whose interests are not so charged.

(d) This chapter does not deprive a partner of a right under exemption laws with respect to the partner's interest in the partnership.

(e) This section provides the exclusive remedy by which a judgment creditor of a partner or partner's transferee may satisfy a judgment out of the judgment debtor's transferable interest in the partnership.

**History.** Acts 1999, No. 1518, § 504.

#### **CASE NOTES**

**Cited:** Patton v. TPI Petroleum, Inc.,  
356 F. Supp. 2d 921 (E.D. Ark. 2005).

### **SUBCHAPTER 6 — PARTNER'S DISSOCIATION**

#### **SECTION.**

4-46-601. Events causing partner's dissociation.

4-46-602. Partner's power to dissociate —  
Wrongful dissociation.

#### **SECTION.**

4-46-603. Effect of partner's dissociation.

## RESEARCH REFERENCES

**ALR.** Rights of attorneys leaving firm with respect to firm clients. 1 A.L.R.4th 1164.

Sale of partnership interest, breach of duty to copartner. 4 A.L.R.4th 1122.

Contractual restriction on right of ac-

countant to practice, incident to sale or withdraw from accountancy partnership. 13 A.L.R.4th 661.

Enforceability of agreement restricting right of attorney to compete with former law firm. 28 A.L.R.5th 420.

#### 4-46-601. Events causing partner's dissociation.

A partner is dissociated from a partnership upon the occurrence of any of the following events:

(1) the partnership's having notice of the partner's express will to withdraw as a partner or on a later date specified by the partner;

(2) an event agreed to in the partnership agreement as causing the partner's dissociation;

(3) the partner's expulsion pursuant to the partnership agreement;

(4) the partner's expulsion by the unanimous vote of the other partners if:

(i) it is unlawful to carry on the partnership business with that partner;

(ii) there has been a transfer of all or substantially all of that partner's transferable interest in the partnership, other than a transfer for security purposes, or a court order charging the partner's interest, which has not been foreclosed;

(iii) within ninety (90) days after the partnership notifies a corporate partner that it will be expelled because it has filed a certificate of dissolution or the equivalent, its charter has been revoked, or its right to conduct business has been suspended by the jurisdiction of its incorporation, there is no revocation of the certificate of dissolution or no reinstatement of its charter or its right to conduct business; or

(iv) a partnership that is a partner has been dissolved and its business is being wound up;

(5) on application by the partnership or another partner, the partner's expulsion by judicial determination because:

(i) the partner engaged in wrongful conduct that adversely and materially affected the partnership business;

(ii) the partner willfully or persistently committed a material breach of the partnership agreement or of a duty owed to the partnership or the other partners under § 4-46-404; or

(iii) the partner engaged in conduct relating to the partnership business which makes it not reasonably practicable to carry on the business in partnership with the partner;

(6) the partner's:

(i) becoming a debtor in bankruptcy;

(ii) executing an assignment for the benefit of creditors;

(iii) seeking, consenting to, or acquiescing in the appointment of a trustee, receiver, or liquidator of that partner or of all or substantially all of that partner's property; or

(iv) failing, within ninety (90) days after the appointment, to have vacated or stayed the appointment of a trustee, receiver, or liquidator of the partner or of all or substantially all of the partner's property obtained without the partner's consent or acquiescence, or failing within ninety (90) days after the expiration of a stay to have the appointment vacated;

(7) in the case of a partner who is an individual:

(i) the partner's death;

(ii) the appointment of a guardian or general conservator for the partner; or

(iii) a judicial determination that the partner has otherwise become incapable of performing the partner's duties under the partnership agreement;

(8) in the case of a partner that is a trust or is acting as a partner by virtue of being a trustee of a trust, distribution of the trust's entire transferable interest in the partnership, but not merely by reason of the substitution of a successor trustee;

(9) in the case of a partner that is an estate or is acting as a partner by virtue of being a personal representative of an estate, distribution of the estate's entire transferable interest in the partnership, but not merely by reason of the substitution of a successor personal representative; or

(10) termination of a partner who is not an individual, partnership, corporation, trust, or estate.

**History.** Acts 1999, No. 1518, § 601.

#### **4-46-602. Partner's power to dissociate — Wrongful dissociation.**

(a) A partner has the power to dissociate at any time, rightfully or wrongfully, by express will pursuant to § 4-46-601(1).

(b) A partner's dissociation is wrongful only if:

(1) it is in breach of an express provision of the partnership agreement; or

(2) in the case of a partnership for a definite term or particular undertaking, before the expiration of the term or the completion of the undertaking:

(i) the partner withdraws by express will, unless the withdrawal follows within ninety (90) days after another partner's dissociation by death or otherwise under § 4-46-601(6)-(10) or wrongful dissociation under this subsection;

(ii) the partner is expelled by judicial determination under § 4-46-601(5);

(iii) the partner is dissociated by becoming a debtor in bankruptcy; or

(iv) in the case of a partner who is not an individual, trust other than a business trust, or estate, the partner is expelled or otherwise dissociated because it willfully dissolved or terminated.

(c) A partner who wrongfully dissociates is liable to the partnership and to the other partners for damages caused by the dissociation. The liability is in addition to any other obligation of the partner to the partnership or to the other partners.

**History.** Acts 1999, No. 1518, § 602.

#### **4-46-603. Effect of partner's dissociation.**

(a) If a partner's dissociation results in a dissolution and winding up of the partnership business, § 4-46-801 et seq. applies; otherwise, § 4-46-701 et seq. applies.

(b) Upon a partner's dissociation:

(1) the partner's right to participate in the management and conduct of the partnership business terminates, except as otherwise provided in § 4-46-803;

(2) the partner's duty of loyalty under § 4-46-404(b)(3) terminates; and

(3) the partner's duty of loyalty under § 4-46-404(b)(1) and (2) and duty of care under § 4-46-404(c) continue only with regard to matters arising and events occurring before the partner's dissociation, unless the partner participates in winding up the partnership's business pursuant to § 4-46-803.

**History.** Acts 1999, No. 1518, § 603.

### **SUBCHAPTER 7 — PARTNER'S DISSOCIATION WHEN BUSINESS NOT WOUND UP**

#### **SECTION.**

4-46-701. Purchase of dissociated partner's interest.

4-46-702. Dissociated partner's power to bind and liability to partnership.

#### **SECTION.**

4-46-703. Dissociated partner's liability to other persons.

4-46-704. Statement of dissociation.

4-46-705. Continued use of partnership name.

#### **4-46-701. Purchase of dissociated partner's interest.**

(a) If a partner is dissociated from a partnership without resulting in a dissolution and winding up of the partnership business under § 4-46-801, the partnership shall cause the dissociated partner's interest in the partnership to be purchased for a buyout price determined pursuant to subsection (b) of this section.

(b) The buyout price of a dissociated partner's interest is the amount that would have been distributable to the dissociating partner under § 4-46-807(b) if, on the date of dissociation, the assets of the partnership were sold at a price equal to the greater of the liquidation value or the value based on a sale of the entire business as a going concern

without the dissociated partner and the partnership were wound up as of that date. Interest must be paid from the date of dissociation to the date of payment.

(c) Damages for wrongful dissociation under § 4-46-602(b), and all other amounts owing, whether or not presently due, from the dissociated partner to the partnership, must be offset against the buyout price. Interest must be paid from the date the amount owed becomes due to the date of payment.

(d) A partnership shall indemnify a dissociated partner whose interest is being purchased against all partnership liabilities, whether incurred before or after the dissociation, except liabilities incurred by an act of the dissociated partner under § 4-46-702.

(e) If no agreement for the purchase of a dissociated partner's interest is reached within one hundred twenty (120) days after a written demand for payment, the partnership shall pay, or cause to be paid, in cash to the dissociated partner the amount the partnership estimates to be the buyout price and accrued interest, reduced by any offsets and accrued interest under subsection (c) of this section.

(f) If a deferred payment is authorized under subsection (h) of this section, the partnership may tender a written offer to pay the amount it estimates to be the buyout price and accrued interest, reduced by any offsets under subsection (c) of this section, stating the time of payment, the amount and type of security for payment, and the other terms and conditions of the obligation.

(g) The payment or tender required by subsection (e) or (f) of this section must be accompanied by the following:

(1) a statement of partnership assets and liabilities as of the date of dissociation;

(2) the latest available partnership balance sheet and income statement, if any;

(3) an explanation of how the estimated amount of the payment was calculated; and

(4) written notice that the payment is in full satisfaction of the obligation to purchase unless, within one hundred twenty (120) days after the written notice, the dissociated partner commences an action to determine the buyout price, any offsets under subsection (c) of this section, or other terms of the obligation to purchase.

(h) A partner who wrongfully dissociates before the expiration of a definite term or the completion of a particular undertaking is not entitled to payment of any portion of the buyout price until the expiration of the term or completion of the undertaking, unless the partner establishes to the satisfaction of the court that earlier payment will not cause undue hardship to the business of the partnership. A deferred payment must be adequately secured and bear interest.

(i) A dissociated partner may maintain an action against the partnership, pursuant to § 4-46-405(b)(2)(ii), to determine the buyout price of that partner's interest, any offsets under subsection (c) of this section, or other terms of the obligation to purchase. The action must be

commenced within one hundred twenty (120) days after the partnership has tendered payment or an offer to pay or within one (1) year after written demand for payment if no payment or offer to pay is tendered. The court shall determine the buyout price of the dissociated partner's interest, any offset due under subsection (c) of this section, and accrued interest, and enter judgment for any additional payment or refund. If deferred payment is authorized under subsection (h) of this section, the court shall also determine the security for payment and other terms of the obligation to purchase. The court may assess reasonable attorney's fees and the fees and expenses of appraisers or other experts for a party to the action, in amounts the court finds equitable, against a party that the court finds acted arbitrarily, vexatiously, or not in good faith. The finding may be based on the partnership's failure to tender payment or an offer to pay or to comply with subsection (g) of this section.

**History.** Acts 1999, No. 1518, § 701.

#### **4-46-702. Dissociated partner's power to bind and liability to partnership.**

(a) For two (2) years after a partner dissociates without resulting in a dissolution and winding up of the partnership business, the partnership, including a converted or surviving organization under § 4-46-901 et seq., is bound by an act of the dissociated partner which would have bound the partnership under § 4-46-301 before dissociation only if at the time of entering into the transaction the other party:

(1) reasonably believed that the dissociated partner was then a partner;

(2) did not have notice of the partner's dissociation; and

(3) is not deemed to have had knowledge under § 4-46-303(e) or notice under § 4-46-704(c).

(b) A dissociated partner is liable to the partnership for any damage caused to the partnership arising from an obligation incurred by the dissociated partner after dissociation for which the partnership is liable under subsection (a) of this section.

**History.** Acts 1999, No. 1518, § 702; substituted "converted or surviving organization" for "surviving partnership" in 2009, No. 408, § 11.

**Amendments.** The 2009 amendment (a).

#### **4-46-703. Dissociated partner's liability to other persons.**

(a) A partner's dissociation does not of itself discharge the partner's liability for a partnership obligation incurred before dissociation. A dissociated partner is not liable for a partnership obligation incurred after dissociation, except as otherwise provided in subsection (b) of this section.

(b) A partner who dissociates without resulting in a dissolution and winding up of the partnership business is liable as a partner to the other party in a transaction entered into by the partnership, or a

converted or surviving organization under § 4-46-901 et seq., within two (2) years after the partner's dissociation, only if the partner is liable for the obligation under § 4-46-306 and at the time of entering into the transaction the other party:

(1) reasonably believed that the dissociated partner was then a partner;

(2) did not have notice of the partner's dissociation; and

(3) is not deemed to have had knowledge under § 4-46-303(e) or notice under § 4-46-704(c).

(c) By agreement with the partnership creditor and the partners continuing the business, a dissociated partner may be released from liability for a partnership obligation.

(d) A dissociated partner is released from liability for a partnership obligation if a partnership creditor, with notice of the partner's dissociation but without the partner's consent, agrees to a material alteration in the nature or time of payment of a partnership obligation.

**History.** Acts 1999, No. 1518, § 703; 2009, No. 408, § 11.

**Amendments.** The 2009 amendment substituted "converted or surviving organization" for "surviving partnership" in

(b); and inserted "dissociation but without the partner's consent, agrees to a material alteration in the nature or time of payment of a partnership obligation" in (d).

#### **4-46-704. Statement of dissociation.**

(a) A dissociated partner or the partnership may file a statement of dissociation stating:

(1) The name of the partnership;

(2) The name and mailing address of the dissociated partner;

(3) That the partner is dissociated from the partnership; and

(4) The date the dissociation is effective.

(b) A statement of dissociation is a limitation on the authority of a dissociated partner for the purposes of § 4-46-303(d) and (e).

(c) For the purposes of §§ 4-46-702(a)(3) and 4-46-703(b)(3), a person not a partner is deemed to have notice of the dissociation ninety (90) days after the statement of dissociation is filed.

**History.** Acts 1999, No. 1518, § 704.

#### **4-46-705. Continued use of partnership name.**

Continued use of a partnership name, or a dissociated partner's name as part thereof, by partners continuing the business does not of itself make the dissociated partner liable for an obligation of the partners or the partnership continuing the business.

**History.** Acts 1999, No. 1518, § 705.

**SUBCHAPTER 8 — WINDING UP PARTNERSHIP BUSINESS**

## SECTION.

4-46-801. Events causing dissolution and winding up of partnership business.

4-46-802. Partnership continues after dissolution.

4-46-803. Right to wind up partnership business.

4-46-804. Partner's power to bind partnership after dissolution.

## SECTION.

4-46-805. Statement of dissolution.

4-46-806. Partner's liability to other partners after dissolution.

4-46-807. Settlement of accounts and contributions among partners.

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**RESEARCH REFERENCES**

**ALR.** Dissolution of partnership: inability of partnership to operate at profit as justification. 20 A.L.R.4th 122.

Necessity that divorce court value property before distributing it. 51 A.L.R.4th 11.

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**4-46-801. Events causing dissolution and winding up of partnership business.**

A partnership is dissolved, and its business must be wound up, only upon the occurrence of any of the following events:

(1) in a partnership at will, the partnership's having notice from a partner, other than a partner who is dissociated under § 4-46-601(2)-(10), of that partner's express will to withdraw as a partner, or on a later date specified by the partner;

(2) in a partnership for a definite term or particular undertaking:

(i) within ninety (90) days after a partner's dissociation by death or otherwise under § 4-46-601(6)-(10) or wrongful dissociation under § 4-46-602(b), the express will of at least half of the remaining partners to wind up the partnership business, for which purpose a partner's rightful dissociation pursuant to § 4-46-602(b)(2)(i) constitutes the expression of that partner's will to wind up the partnership business;

(ii) the express will of all of the partners to wind up the partnership business; or

(iii) the expiration of the term or the completion of the undertaking;

(3) an event agreed to in the partnership agreement resulting in the winding up of the partnership business;

(4) an event that makes it unlawful for all or substantially all of the business of the partnership to be continued, but a cure of illegality within ninety (90) days after notice to the partnership of the event is effective retroactively to the date of the event for purposes of this section;

(5) on application by a partner, a judicial determination that:

- (i) the economic purpose of the partnership is likely to be unreasonably frustrated;
  - (ii) another partner has engaged in conduct relating to the partnership business which makes it not reasonably practicable to carry on the business in partnership with that partner; or
  - (iii) it is not otherwise reasonably practicable to carry on the partnership business in conformity with the partnership agreement;
- or
- (6) on application by a transferee of a partner's transferable interest, a judicial determination that it is equitable to wind up the partnership business:

- (i) after the expiration of the term or completion of the undertaking, if the partnership was for a definite term or particular undertaking at the time of the transfer or entry of the charging order that gave rise to the transfer; or
- (ii) at any time, if the partnership was a partnership at will at the time of the transfer or entry of the charging order that gave rise to the transfer.

**History.** Acts 1999, No. 1518, § 801.

#### **4-46-802. Partnership continues after dissolution.**

(a) Subject to subsection (b) of this section, a partnership continues after dissolution only for the purpose of winding up its business. The partnership is terminated when the winding up of its business is completed.

(b) At any time after the dissolution of a partnership and before the winding up of its business is completed, all of the partners, including any dissociating partner other than a wrongfully dissociating partner, may waive the right to have the partnership's business wound up and the partnership terminated. In that event:

- (1) the partnership resumes carrying on its business as if dissolution had never occurred, and any liability incurred by the partnership or a partner after the dissolution and before the waiver is determined as if dissolution had never occurred; and
- (2) the rights of a third party accruing under § 4-46-804(1) or arising out of conduct in reliance on the dissolution before the third party knew or received a notification of the waiver may not be adversely affected.

**History.** Acts 1999, No. 1518, § 802.

#### **4-46-803. Right to wind up partnership business.**

(a) After dissolution, a partner who has not wrongfully dissociated may participate in winding up the partnership's business, but on application of any partner, partner's legal representative, or transferee, the court, for good cause shown, may order judicial supervision of the winding up.

(b) The legal representative of the last surviving partner may wind up a partnership's business.

(c) A person winding up a partnership's business may preserve the partnership business or property as a going concern for a reasonable time, prosecute and defend actions and proceedings, whether civil, criminal, or administrative, settle and close the partnership's business, dispose of and transfer the partnership's property, discharge the partnership's liabilities, distribute the assets of the partnership pursuant to § 4-46-807, settle disputes by mediation or arbitration, and perform other necessary acts.

**History.** Acts 1999, No. 1518, § 803.

#### **4-46-804. Partner's power to bind partnership after dissolution.**

Subject to § 4-46-805, a partnership is bound by a partner's act after dissolution that:

- (1) is appropriate for winding up the partnership business; or
- (2) would have bound the partnership under § 4-46-301 before dissolution, if the other party to the transaction did not have notice of the dissolution.

**History.** Acts 1999, No. 1518, § 804.

#### **4-46-805. Statement of dissolution.**

(a) After dissolution, a partner who has not wrongfully dissociated may file a statement of dissolution stating the name of the partnership and that the partnership has dissolved and is winding up its business.

(b) A statement of dissolution cancels a filed statement of partnership authority for the purposes of § 4-46-303(d) and is a limitation on authority for the purposes of § 4-46-303(e).

(c) For the purposes of §§ 4-46-301 and 4-46-804, a person not a partner is deemed to have notice of the dissolution and the limitation on the partners' authority as a result of the statement of dissolution ninety (90) days after it is filed.

(d) After filing and, if appropriate, recording a statement of dissolution, a dissolved partnership may file and, if appropriate, record a statement of partnership authority which will operate with respect to a person not a partner as provided in § 4-46-303(d) and (e) in any transaction, whether or not the transaction is appropriate for winding up the partnership business.

**History.** Acts 1999, No. 1518, § 805.

#### **4-46-806. Partner's liability to other partners after dissolution.**

(a) Except as otherwise provided in subsection (b) of this section and § 4-46-306, after dissolution a partner is liable to the other partners for

the partner's share of any partnership liability incurred under § 4-46-804.

(b) A partner who, with knowledge of the dissolution, incurs a partnership liability under § 4-46-804(2) by an act that is not appropriate for winding up the partnership business is liable to the partnership for any damage caused to the partnership arising from the liability.

**History.** Acts 1999, No. 1518, § 806.

#### **4-46-807. Settlement of accounts and contributions among partners.**

(a) In winding up a partnership's business, the assets of the partnership, including the contributions of the partners required by this section, must be applied to discharge its obligations to creditors, including, to the extent permitted by law, partners who are creditors. Any surplus must be applied to pay in cash the net amount distributable to partners in accordance with their right to distributions under subsection (b) of this section.

(b) Each partner is entitled to a settlement of all partnership accounts upon winding up the partnership business. In settling accounts among the partners, profits and losses that result from the liquidation of the partnership assets must be credited and charged to the partners' accounts. The partnership shall make a distribution to a partner in an amount equal to any excess of the credits over the charges in the partner's account. A partner shall contribute to the partnership an amount equal to any excess of the charges over the credits in the partner's account but excluding from the calculation charges attributable to an obligation for which the partner is not personally liable under § 4-46-306.

(c) If a partner fails to contribute the full amount required under subsection (b) of this section, all of the other partners shall contribute, in the proportions in which those partners share partnership losses, the additional amount necessary to satisfy the partnership obligations for which they are personally liable under § 4-46-306. A partner or partner's legal representative may recover from the other partners any contributions the partner makes to the extent the amount contributed exceeds that partner's share of the partnership obligations for which the partner is personally liable under § 4-46-306.

(d) After the settlement of accounts, each partner shall contribute, in the proportion in which the partner shares partnership losses, the amount necessary to satisfy partnership obligations that were not known at the time of the settlement and for which the partner is personally liable under § 4-46-306.

(e) The estate of a deceased partner is liable for the partner's obligation to contribute to the partnership.

(f) An assignee for the benefit of creditors of a partnership or a partner, or a person appointed by a court to represent creditors of a partnership or a partner, may enforce a partner's obligation to contribute to the partnership.

**History.** Acts 1999, No. 1518, § 807.

## SUBCHAPTER 9 — CONVERSION AND MERGER

### SECTION.

- 4-46-901. Definitions.
- 4-46-902. Conversion.
- 4-46-903. Action on plan of conversion by converting partnership.
- 4-46-904. Filings required for conversion — Effective date.
- 4-46-905. Effect of conversion.
- 4-46-906. Merger.
- 4-46-907. Action on plan of merger by constituent partnership.
- 4-46-908. Filings required for merger — Effective date.

### SECTION.

- 4-46-909. Effect of merger.
- 4-46-910. Restrictions on approval of conversions and mergers and on relinquishing limited liability partnership status.
- 4-46-911. Liability of partner after conversion or merger.
- 4-46-912. Power of partners and persons dissociated as partners to bind organization after conversion or merger.
- 4-46-913. Chapter not exclusive.

**Publisher's Notes.** This subchapter was repealed and reenacted by Acts 2009, No. 408, § 6. The former subchapter, concerning conversions and mergers, was derived from the following sources:

- 4-46-901. Acts 1999, No. 1518, § 901; 2007, No. 15, § 5.
- 4-46-902. Acts 1999, No. 1518, § 902; 2007, No. 15, § 6.

- 4-46-903. Acts 1999, No. 1518, § 903.
- 4-46-904. Acts 1999, No. 1518, § 904.
- 4-46-905. Acts 1999, No. 1518, § 905.
- 4-46-906. Acts 1999, No. 1518, § 906.
- 4-46-907. Acts 1999, No. 1518, § 907.
- 4-46-908. Acts 1999, No. 1518, § 908.

### 4-46-901. Definitions.

In this subchapter:

- (1) "Constituent partnership" means a constituent organization that is a partnership (including a limited liability partnership);
- (2) "Constituent organization" means an organization that is party to a merger;
- (3) "Converted organization" means the organization into which a converting organization converts under §§ 4-46-902 — 4-46-905;
- (4) "Converting partnership" means a converting organization that is a partnership (including a limited liability partnership);
- (5) "Converting organization" means an organization that converts into another organization under § 4-46-902;
- (6) "Governing statute" of an organization means the statute that governs the organization's internal affairs;
- (7) "In a record" means maintained or kept on file by the organization at an office of the organization or with the Secretary of State;
- (8)(A) "Organization" means:
  - (i) A partnership, including a limited liability partnership;
  - (ii) A limited partnership, including a limited liability limited partnership;

- (iii) A limited liability company;
- (iv) A business trust;
- (v) A corporation; or
- (vi) Any other entity that has a governing statute.

(B) "Organization" includes a domestic or foreign organization whether or not the organization is organized for profit;

(9) "Organizational documents" means:

(A) For a domestic or foreign general partnership, its partnership agreement and if applicable statement of qualification;

(B) For a domestic or foreign limited partnership, its certificate of limited partnership and partnership agreement;

(C) For a domestic or foreign limited liability company, its articles of organization and operating agreement, or the comparable records provided for in its governing statute;

(D) For a business trust, its agreement of trust and declaration of trust;

(E) For a domestic or foreign corporation for profit, its articles of incorporation, bylaws, and other agreements among its shareholders which are authorized by its governing statute or the comparable records provided for in its governing statute; and

(F) For any other organization, the records that:

(i) Create the organization;

(ii) Determine the internal governance of the organization; and

(iii) Determine the relations among the organization's owners, members, and interested parties; and

(10) "Personal liability" means individual financial responsibility for a debt, liability, or other obligation of an organization that is imposed on a person that co-owns, has an interest in, or is a member of the organization:

(A) By the organization's governing statute solely because the person co-owns, has an interest in, or is a member of the organization; or

(B) By the organization's organizational documents under a provision of the organization's governing statute authorizing the documents to make one (1) or more specified persons liable for all or specified debts, liabilities, and other obligations of the organization solely because the person or persons co-own, have an interest in, or are members of the organization; and

(11) "Surviving organization" means an organization into which one (1) or more other organizations are merged.

**History.** Acts 2009, No. 408, § 6.

#### **4-46-902. Conversion.**

(a) An organization other than a partnership may convert to a partnership, and a partnership may convert to another organization under this section and §§ 4-46-903 — 4-46-905 and a plan of conversion, if the:

(1) Other organization's governing statute authorizes the conversion and is complied with; and

(2) Conversion is not prohibited by the law of the jurisdiction that enacted the governing statute.

(b) A plan of conversion must be in a record and must include the:

(1) Name and form of the organization before conversion;

(2) Name and form of the organization after conversion; and

(3) Terms and conditions of the conversion, including the manner and basis for converting interests in the converting organization into any combination of money, interests in the converted organization, and other consideration; and

(4) Organizational documents of the converted organization.

**History.** Acts 2009, No. 408, § 6.

#### **4-46-903. Action on plan of conversion by converting partnership.**

(a) Subject to § 4-46-910, a plan of conversion must be consented to by all of the partners of a converting partnership.

(b) Subject to § 4-46-910 and any contractual rights, until a conversion is filed under § 4-46-904, a converting partnership may amend the plan or abandon the planned conversion:

(1) As provided in the plan; and

(2) Except as prohibited by the plan, by the same consent required to approve the plan.

**History.** Acts 2009, No. 408, § 6.

#### **4-46-904. Filings required for conversion — Effective date.**

(a)(1) After a plan of conversion is approved a converting partnership shall file articles of conversion with the Secretary of State.

(2) The articles of conversion shall include:

(A) A statement that the partnership has been converted into another organization;

(B) The name and form of the converted organization and the jurisdiction of its governing statute;

(C) The date the conversion is effective under the governing statute of the converted organization;

(D) A statement that the conversion was approved as required by this subchapter;

(E) A statement that the conversion was approved as required by the governing statute of the converted organization;

(F) A statement confirming that the converted organization has filed a statement appointing an agent for service of process under § 4-20-112 if the converted organization is a foreign organization not authorized to transact business in this state; and

(G)(i) A copy of the plan of conversion; or

(ii) A statement that:

(a) Contains the address of an office of the organization where the plan of conversion is on file; and

(b) A copy of the plan of conversion will be furnished by the converting partnership on request and without cost to any partner of the converting partnership.

(b)(1) If the converting organization is not a converting partnership, the converting organization shall file a statement of qualification with the Secretary of State.

(2) The statement of qualification shall include, in addition to the information required by § 4-46-1001:

(A) A statement that the partnership was converted from another organization;

(B) The name and form of the converting organization and the jurisdiction of its governing statute; and

(C) A statement that the conversion was approved in a manner that complied with the converting organization's governing statute.

(c) A conversion becomes effective:

(1) If the converted organization is a partnership, when the articles of conversion indicate that the conversion takes effect; and

(2) If the converted organization is not a partnership, as provided by the governing statute of the converted organization.

**History.** Acts 2009, No. 408, § 6.

#### **4-46-905. Effect of conversion.**

(a) An organization that has been converted under this subchapter is for all purposes the same entity that existed before the conversion.

(b) When a conversion takes effect:

(1) All property owned by the converting organization remains vested in the converted organization;

(2) All debts, liabilities, and other obligations of the converting organization continue as obligations of the converted organization;

(3) An action or proceeding pending by or against the converting organization may be continued as if the conversion had not occurred;

(4) Except as prohibited by other law, all of the rights, privileges, immunities, powers, and purposes of the converting organization remain vested in the converted organization;

(5) Except as otherwise provided in the plan of conversion, the terms and conditions of the plan of conversion take effect; and

(6) Except as otherwise agreed, the conversion does not dissolve a converting partnership under § 4-46-801 et seq.

(c)(1) A converted organization that is a foreign organization consents to the jurisdiction of the courts of this state to enforce any obligation owed by the converting partnership, if before the conversion the converting partnership was subject to suit in this state on the obligation.

(2) A converted organization that is a foreign organization and not authorized to transact business in this state may be served with process under § 4-20-113 if the converted organization:

(A) Fails to appoint an agent for service of process under § 4-20-112;

(B) No longer has an agent for service of process; or

(C) Has an agent for service of process that cannot with reasonable diligence be served.

**History.** Acts 2009, No. 408, § 6.

#### **4-46-906. Merger.**

(a) A partnership may merge with one (1) or more other constituent organizations under this section and §§ 4-46-907 — 4-46-909 and a plan of merger if:

(1) The governing statute of each of the other organizations authorizes the merger;

(2) The merger is not prohibited by the law of a jurisdiction that enacted any of the governing statutes; and

(3) Each of the other organizations complies with its governing statute in effecting the merger.

(b) A plan of merger must be in a record and must include:

(1) The name and form of each constituent organization;

(2) The name and form of the surviving organization;

(3) The terms and conditions of the merger, including the manner and basis for converting the interests in each constituent organization into any combination of money, interests in the surviving organization, and other consideration; and

(4) Any amendments to be made by the merger to the surviving organization's organizational documents.

**History.** Acts 2009, No. 408, § 6.

#### **4-46-907. Action on plan of merger by constituent partnership.**

(a) Subject to § 4-46-910, a plan of merger must be consented to by all of the partners of a constituent partnership.

(b) Subject to § 4-46-910 and to any contractual rights, until a merger is filed under § 4-46-908, a constituent partnership may amend the plan or abandon the planned merger:

(1) As provided in the plan; and

(2) Except as prohibited by the plan, with the same consent required to approve the plan.

**History.** Acts 2009, No. 408, § 6.

**4-46-908. Filings required for merger — Effective date.**

(a) After each constituent organization has approved a merger, articles of merger must be signed by an authorized representative of each constituent organization and filed with the Secretary of State.

(b) The articles of merger shall include:

(1) The name and form of each constituent organization and the jurisdiction of its governing statute;

(2) The name and form of the surviving organization and the jurisdiction of its governing statute;

(3) The date the merger is effective under the governing statute of the surviving organization;

(4) Any amendments provided for in the plan of merger for the organizational document of the surviving organization if the organizational document is required to be filed by the governing statute of the surviving organization;

(5) A statement as to each constituent organization that the merger was approved as required by the organization's governing statute;

(6) A statement confirming that the surviving organization has filed a statement appointing an agent for service of process under § 4-20-112 if the surviving organization is a foreign organization not authorized to transact business in this state; and

(7)(A) A copy of the plan of merger; or

(B) A statement that:

(i) Contains the address of an office of the organization where the plan of merger is on file; and

(ii) A copy of the plan of merger will be furnished by the surviving organization on request and without cost to any shareholder, member, partner, or other owner of any constituent organization; and

(8) Any additional information required by the governing statute of any constituent organization.

(c) A merger becomes effective under this subchapter:

(1) If the surviving organization is a partnership, upon the later of:

(A) Compliance with subsection (a) of this section; or

(B) As specified in the articles of merger; or

(2) If the surviving organization is not a partnership, as provided by the governing statute of the surviving organization.

**History.** Acts 2009, No. 408, § 6.

**4-46-909. Effect of merger.**

(a) When a merger becomes effective:

(1) The surviving organization continues or comes into existence;

(2) Each constituent organization that merges into the surviving organization ceases to exist as a separate entity;

(3) All property owned by each constituent organization that ceases to exist vests in the surviving organization;

(4) All debts, liabilities, and other obligations of each constituent organization that ceases to exist continue as obligations of the surviving organization;

(5) An action or proceeding pending by or against a constituent organization that ceases to exist may continue as if the merger had not occurred;

(6) Except as prohibited by other law, all of the rights, privileges, immunities, powers, and purposes of each constituent organization that ceases to exist vest in the surviving organization;

(7) Except as otherwise provided in the plan of merger, the terms and conditions of the plan of merger take effect;

(8) Except as otherwise agreed, if a constituent partnership ceases to exist, the merger does not dissolve the partnership under § 4-46-801 et seq.; and

(9) Any amendments provided for in the articles of merger for the organizational documents of the surviving organization become effective.

(b)(1) A surviving organization that is a foreign organization consents to the jurisdiction of the courts of this state to enforce any obligation owed by a constituent organization, if before the merger the constituent organization was subject to suit in this state on the obligation.

(2) A surviving organization that is a foreign organization and not authorized to transact business in this state may be served with process under § 4-20-113 if the surviving organization:

(A) Fails to appoint an agent for service of process under § 4-20-112;

(B) No longer has an agent for service of process; or

(C) Has an agent for service of process that cannot with reasonable diligence be served.

**History.** Acts 2009, No. 408, § 6.

#### **4-46-910. Restrictions on approval of conversions and mergers and on relinquishing limited liability partnership status.**

(a) If a partner of a converting or constituent partnership will have personal liability with respect to a converted or surviving organization, approval and amendment of a plan of conversion or merger are ineffective without the consent of the partner unless:

(1) The partnership's partnership agreement provides for the approval of the conversion or merger with the consent of fewer than all of the partners; and

(2) The partner has consented to the provision of the partnership agreement.

(b) An amendment to a statement of qualification of a limited liability partnership which deletes a statement that the partnership is

a limited liability partnership is ineffective without the consent of each partner unless:

(1) The partnership's partnership agreement provides for the amendment with the consent of less than all of the partners; and

(2) Each partner that does not consent to the amendment has consented to the provision of the partnership agreement.

(c) A partner does not give the consent required by subsection (a) or subsection (b) of this section merely by consenting to a provision of the partnership agreement that permits the partnership agreement to be amended with the consent of fewer than all the partners.

**History.** Acts 2009, No. 408, § 6.

#### **4-46-911. Liability of partner after conversion or merger.**

(a) A conversion or merger under this chapter does not discharge any liability under § 4-46-306 or § 4-46-703 of a person that was a partner in or dissociated as a partner from a converting or constituent partnership, but:

(1) The provisions of this chapter pertaining to the collection or discharge of the liability continue to apply to the liability;

(2) The converted or surviving organization is deemed to be the converting or constituent partnership under § 4-46-306 or § 4-46-703; and

(3) If a person is required to pay any amount under this subsection:

(A) The person has a right of contribution from each other person that was liable as a partner under § 4-46-306 when the obligation was incurred and has not been released from the obligation under § 4-46-703; and

(B) The contribution due from each other person is in proportion to the right to receive distributions in the capacity of partner in effect for each other person when the obligation was incurred.

(b) In addition to any other liability provided by law:

(1) A person that immediately before a conversion or merger became effective was a partner in a converting or constituent partnership that was not a limited liability partnership is personally liable for each obligation of the converted or surviving organization arising from a transaction with a third party after the conversion or merger becomes effective if at the time the third party enters into the transaction, the third party:

(A) Does not have notice of the conversion or merger; and

(B) Reasonably believes that:

(i) The converted or surviving organization is the converting or constituent partnership;

(ii) The converting or constituent partnership is not a limited liability partnership; and

(iii) The person is a partner in the converting or constituent partnership; and

(2) A person that was dissociated as a partner from a converting or constituent partnership before the conversion or merger became effective is personally liable for each obligation of the converted or surviving organization arising from a transaction with a third party after the conversion or merger becomes effective if:

(A) Immediately before the conversion or merger became effective the converting or surviving partnership was not a limited liability partnership; and

(B) At the time the third party enters into the transaction less than two (2) years have passed since the person dissociated as a partner and the third party:

(i) Does not have notice of the dissociation;

(ii) Does not have notice of the conversion or merger; and

(iii) Reasonably believes that:

(a) The converted or surviving organization is the converting or constituent partnership;

(b) The converting or constituent partnership is not a constituent limited liability partnership; and

(c) The person is a partner in the converting or constituent partnership.

**History.** Acts 2009, No. 408, § 6.

#### **4-46-912. Power of partners and persons dissociated as partners to bind organization after conversion or merger.**

(a) An act of a person that immediately before a conversion or merger became effective was a partner in a converting or constituent partnership binds the converted or surviving organization after the conversion or merger becomes effective if:

(1) Before the conversion or merger became effective the act would have bound the converting or constituent partnership under § 4-46-301; and

(2) At the time the third party enters into the transaction the third party:

(A) Does not have notice of the conversion or merger; and

(B) Reasonably believes that the converted or surviving business is the converting or constituent partnership and that the person is a partner in the converting or constituent partnership.

(b) An act of a person that before a conversion or merger became effective was dissociated as a partner from a converting or constituent partnership binds the converted or surviving organization after the conversion or merger becomes effective if:

(1) Before the conversion or merger became effective the act would have bound the converting or constituent partnership under § 4-46-301 if the person had been a partner; and

(2) At the time the third party enters into the transaction, less than two (2) years have passed since the person dissociated as a general partner and the third party:

(A) Does not have notice of the dissociation;

(B) Does not have notice of the conversion or merger; and

(C) Reasonably believes that the converted or surviving organization is the converting or constituent partnership and that the person is a partner in the converting or constituent partnership.

(c) If a person with knowledge of the conversion or merger causes a converted or surviving organization to incur an obligation under subsection (a) or subsection (b) of this section the person is liable:

(1) To the converted or surviving organization for any damage caused to the organization arising from the obligation; and

(2) If another person is liable for the obligation, to the other person for any damage caused to the other person arising from the liability.

**History.** Acts 2009, No. 408, § 6.

#### **4-46-913. Chapter not exclusive.**

This chapter does not preclude an entity from being converted or merged under other law.

**History.** Acts 2009, No. 408, § 6.

### **SUBCHAPTER 10 — LIMITED LIABILITY PARTNERSHIP**

#### **SECTION.**

4-46-1001. Statement of qualification.

4-46-1002. Name.

#### **SECTION.**

4-46-1003. Annual report.

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**Effective Dates.** Acts 2007, No. 638,  
§ 70: Sept. 1, 2007.

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#### **4-46-1001. Statement of qualification.**

(a) A partnership may become a limited liability partnership pursuant to this section.

(b) The terms and conditions on which a partnership becomes a limited liability partnership must be approved by the vote necessary to amend the partnership agreement except, in the case of a partnership agreement that expressly considers contribution obligations, the vote necessary to amend those provisions.

(c) After the approval required by subsection (b) of this section, a partnership may become a limited liability partnership by filing a statement of qualification. The statement must contain:

(1) the name of the partnership;

(2) the street address of the partnership's chief executive office and, if different, the street address of an office in this State, if any;

(3) if there is no office in this State, the information required by § 4-20-105(a);

(4) a statement that the partnership elects to be a limited liability partnership; and

(5) a deferred effective date, if any.

(d) [Reserved.]

(e) The status of a partnership as a limited liability partnership is effective on the later of the filing of the statement or a date specified in the statement. The status remains effective, regardless of changes in the partnership, until it is canceled pursuant to § 4-46-105(d) or revoked pursuant to § 4-46-1003.

(f) The status of a partnership as a limited liability partnership and the liability of its partners is not affected by errors or later changes in the information required to be contained in the statement of qualification under subsection (c) of this section.

(g) The filing of a statement of qualification establishes that a partnership has satisfied all conditions precedent to the qualification of the partnership as a limited liability partnership.

(h) An amendment or cancellation of a statement of qualification is effective when it is filed or on a deferred effective date specified in the amendment or cancellation.

**History.** Acts 1999, No. 1518, § 1001; 2007, No. 638, § 53.

**A.C.R.C. Notes.** Subsections (d) through (g) were redesignated as (e) through (h) at the direction of the Arkansas Code Revision Commission. Former subsection (d) has been reserved to comply

with the subsection designations within the Uniform Partnership Act.

**Effective Dates.** Acts 2007, No. 638, § 70: Effective date clause provided: "Effective date. This act takes effect September 1, 2007."

#### **4-46-1002. Name.**

The name of a limited liability partnership must end with "Registered Limited Liability Partnership", "Limited Liability Partnership", "R.L.L.P.", "L.L.P.", "RLLP," or "LLP".

**History.** Acts 1999, No. 1518, § 1002.

#### **4-46-1003. Annual report.**

(a) A limited liability partnership, and a foreign limited liability partnership authorized to transact business in this State, shall file an annual report in the office of the Secretary of State which contains:

(1) the name of the limited liability partnership and the state or other jurisdiction under whose laws the foreign limited liability partnership is formed;

(2) the current street address of the partnership's chief executive office and, if different, the current street address of an office in this State, if any; and

(3) if there is no current office in this State, the information required by § 4-20-105(a).

(b) An annual report must be filed between January 1 and April 1 of each year following the calendar year in which a partnership files a statement of qualification or a foreign partnership becomes authorized to transact business in this State.

(c) The Secretary of State may administratively revoke the statement of qualification of a partnership that fails to file an annual report when due or to pay the required filing fee. The Secretary of State shall provide the partnership at least sixty (60) days' written notice of intent to revoke the statement. The notice must be mailed to the partnership at its chief executive office set forth in the last filed statement of qualification or annual report. The notice must specify the annual report that has not been filed, the fee that has not been paid, and the effective date of the revocation. The revocation is not effective if the annual report is filed and the fee is paid before the effective date of the revocation.

(d) A revocation under subsection (c) of this section only affects a partnership's status as a limited liability partnership and is not an event of dissolution of the partnership.

(e) A partnership whose statement of qualification has been administratively revoked may apply to the Secretary of State for reinstatement within two (2) years after the effective date of the revocation. The application must state:

(1) the name of the partnership and the effective date of the revocation; and

(2) that the ground for revocation either did not exist or has been corrected.

(f) A reinstatement under subsection (e) of this section relates back to and takes effect as of the effective date of the revocation, and the partnership's status as a limited liability partnership continues as if the revocation had never occurred.

**History.** Acts 1999, No. 1518, § 1003; 2007, No. 638, § 54.

**Amendments.** The 2007 amendment substituted "the information required by § 4-20-105 (a)" for "the name and street address of the partnership's agent for service of process who must be an individual

resident of this State or any other person authorized to do business in this State" in (c)(3).

**Effective Dates.** Acts 2007, No. 638, § 70: Effective date clause provided: "Effective date. This act takes effect September 1, 2007."

## SUBCHAPTER 11 — FOREIGN LIMITED LIABILITY PARTNERSHIP

### SECTION.

4-46-1101. Law governing foreign limited liability partnership.

4-46-1102. Statement of foreign qualification.

### SECTION.

4-46-1103. Effect of failure to qualify.

4-46-1104. Activities not constituting transacting business.

4-46-1105. Action by Attorney General.

**Effective Dates.** Acts 2007, No. 638,  
§ 70: Sept. 1, 2007.

#### **4-46-1101. Law governing foreign limited liability partnership.**

(a) The laws under which a foreign limited liability partnership is formed govern relations among the partners and between the partners and the partnership and the liability of partners for obligations of the partnership.

(b) A foreign limited liability partnership may not be denied a statement of foreign qualification by reason of any difference between the laws under which the partnership was formed and the laws of this State.

(c) A statement of foreign qualification does not authorize a foreign limited liability partnership to engage in any business or exercise any power that a partnership may not engage in or exercise in this State as a limited liability partnership.

**History.** Acts 1999, No. 1518, § 1101.

#### **4-46-1102. Statement of foreign qualification.**

(a) Before transacting business in this State, a foreign limited liability partnership must file a statement of foreign qualification. The statement must contain:

(1) the name of the foreign limited liability partnership which satisfies the requirements of the State or other jurisdiction under whose laws it is formed and ends with “Registered Limited Liability Partnership”, “Limited Liability Partnership”, “R.L.L.P.”, “L.L.P.”, “RLLP,” or “LLP”;

(2) the street address of the partnership’s chief executive office;

(3) the information required by § 4-20-105(a); and

(4) a deferred effective date, if any.

(b) [Reserved.]

(c) The status of a partnership as a foreign limited liability partnership is effective on the later of the filing of the statement of foreign qualification or a date specified in the statement. The status remains effective, regardless of changes in the partnership, until it is canceled pursuant to § 4-46-105(d) or revoked pursuant to § 4-46-1003.

(d) An amendment or cancellation of a statement of foreign qualification is effective when it is filed or on a deferred effective date specified in the amendment or cancellation.

**History.** Acts 1999, No. 1518, § 1102; 2007, No. 638, § 55.

**A.C.R.C. Notes.** Subsections (b) and (c) were redesignated as (c) and (d) at the direction of the Arkansas Code Revision Commission. Former subsection (b) has

been reserved to comply with the subsection designations within the Uniform Partnership Act.

**Amendments.** The 2007 amendment, in (a), deleted “and, if different, the street address of an office in this State, if any” at

the end of (2), and substituted "the information required by § 4-20-105(a)" for "if there is no office in this State, the name and street address of the partnership's agent for service of process who must be an individual resident of this State or any

other person authorized to do business in this State" in (3).

**Effective Dates.** Acts 2007, No. 638, § 70: Effective date clause provided: "Effective date. This act takes effect September 1, 2007."

#### **4-46-1103. Effect of failure to qualify.**

(a) A foreign limited liability partnership transacting business in this State may not maintain an action or proceeding in this State unless it has in effect a statement of foreign qualification.

(b) The failure of a foreign limited liability partnership to have in effect a statement of foreign qualification does not impair the validity of a contract or act of the foreign limited liability partnership or preclude it from defending an action or proceeding in this State.

(c) Limitations on personal liability of partners are not waived solely by transacting business in this State without a statement of foreign qualification.

(d) If a foreign limited liability partnership transacts business in this State without a statement of foreign qualification, the Secretary of State is its agent for service of process with respect to claims for relief arising out of the transaction of business in this State.

**History.** Acts 1999, No. 1518, § 1103.

#### **4-46-1104. Activities not constituting transacting business.**

(a) Activities of a foreign limited liability partnership which do not constitute transacting business within the meaning of this subchapter include:

- (1) maintaining, defending, or settling an action or proceeding;
- (2) holding meetings of its partners or carrying on any other activity concerning its internal affairs;
- (3) maintaining bank accounts;
- (4) maintaining offices or agencies for the transfer, exchange, and registration of the partnership's own securities or maintaining trustees or depositories with respect to those securities;
- (5) selling through independent contractors;
- (6) soliciting or obtaining orders, whether by mail or through employees or agents or otherwise, if the orders require acceptance outside this State before they become contracts;
- (7) creating or acquiring indebtedness, mortgages, or security interests in real or personal property;
- (8) securing or collecting debts or foreclosing mortgages or other security interests in property securing the debts, and holding, protecting, and maintaining property so acquired;
- (9) conducting an isolated transaction that is completed within thirty (30) days and is not one in the course of similar transactions of like nature; and
- (10) transacting business in interstate commerce.

(b) For purposes of this subchapter, the ownership in this State of income-producing real property or tangible personal property, other than property excluded under subsection (a) of this section, constitutes transacting business in this State.

(c) This section does not apply in determining the contacts or activities that may subject a foreign limited liability partnership to service of process, taxation, or regulation under any other law of this State.

**History.** Acts 1999, No. 1518, § 1104.

#### **4-46-1105. Action by Attorney General.**

The Attorney General may maintain an action to restrain a foreign limited liability partnership from transacting business in this State in violation of this subchapter.

**History.** Acts 1999, No. 1518, § 1105.

### **SUBCHAPTER 12 — MISCELLANEOUS PROVISIONS**

#### **SECTION.**

4-46-1201. Uniformity of application and construction.

4-46-1202. Short title.

4-46-1203. Effective date.

#### **SECTION.**

4-46-1204, 4-46-1205. [Reserved.]

4-46-1206. Savings clause.

4-46-1207. Fees.

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**Effective Dates.** Acts 2007, No. 646, § 14: July 1, 2007. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that business entities are presently paying different fees for similar services from the Secretary of State; that this act will alleviate any undue hardship to any entity by standardizing business and commercial filing fees; and that this act is

immediately necessary to aid the record-keeping and accounting functions of the Secretary of State and should take effect at the beginning of the state's fiscal year. Therefore, an emergency is declared to exist and this act being necessary for the preservation of the public peace, health, and safety shall become effective on July 1, 2007."

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#### **4-46-1201. Uniformity of application and construction.**

This chapter shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it.

**History.** Acts 1999, No. 1518, § 1201.

**4-46-1202. Short title.**

This chapter may be cited as the Uniform Partnership Act (1996).

**History.** Acts 1999, No. 1518, § 1202.

**4-46-1203. Effective date.**

This chapter takes effect January 1, 2000.

**History.** Acts 1999, No. 1518, § 1203.

**4-46-1204, 4-46-1205. [Reserved.]**

**4-46-1206. Savings clause.**

This chapter does not affect an action or proceeding commenced or right accrued before this chapter takes effect.

**History.** Acts 1999, No. 1518, § 1206.

**4-46-1207. Fees.**

(a) The Secretary of State shall collect the following fees when the documents described in this chapter are delivered to him or her for filing:

(1)	Statement of partnership authority .....	\$ 50.00
(2)	Amendment of statement partnership authority .....	15.00
(3)	Change of agent for service .....	15.00
(4)	Cancellation of statement of partnership authority ....	15.00
(5)	Statement of conversion or merger.....	15.00
(6)	Statement of dissolution.....	15.00
(7)	Statement of dissociation .....	15.00
(8)	Statement of denial.....	15.00
(9)	Statement of foreign partnership authority .....	300.00
(10)	Amendment of statement of foreign partnership authority .....	15.00
(11)	Change of foreign partnership agent for service.....	No Fee
(12)	Cancellation of statement of foreign partnership authority.....	15.00
(13)	Any other document required or permitted to be filed by this chapter .....	15.00

(b)(1) The Secretary of State shall collect a fee of twenty-five dollars (\$25.00) each time process is served on him or her under this chapter.

(2) The party to a proceeding causing service of process is entitled to recover the process fee as costs if the party prevails in the proceeding.

(c) The Secretary of State shall collect the following fees for copying and certifying the copy of any filed document relating to a domestic or foreign partnership:

(1) Fifty cents (50¢) a page for copying; and

(2) Five dollars (\$5.00) for the certificate.

(d) The Secretary of State shall collect the following fees when the documents described in this chapter are delivered to him or her by electronic means:

(1) Four dollars (\$4.00) for the processing fee when the filing fee is \$0 to \$50;

(2) Five dollars (\$5.00) for the processing fee when the filing fee is \$51 to \$99;

(3) Ten dollars (\$10.00) for the processing fee when the filing fee is \$100 to \$299; and

(4) Twelve dollars (\$12.00) for the processing fee when the filing fee is \$300 or more.

**History.** Acts 1999, No. 1518, § 1207; 2007, No. 646, § 12.

**Amendments.** The 2007 amendment rewrote the section.

## CHAPTER 47

### UNIFORM LIMITED PARTNERSHIP ACT (2001)

#### SUBCHAPTER.

1. GENERAL PROVISIONS.
2. FORMATION — CERTIFICATE OF LIMITED PARTNERSHIP AND OTHER FILINGS.
3. LIMITED PARTNERS.
4. GENERAL PARTNERS.
5. CONTRIBUTIONS AND DISTRIBUTIONS.
6. DISSOCIATION.
7. TRANSFERABLE INTERESTS AND RIGHTS OF TRANSFEREES AND CREDITORS.
8. DISSOLUTION.
9. FOREIGN LIMITED PARTNERSHIPS.
10. ACTIONS BY PARTNERS.
11. CONVERSION AND MERGER.
12. MISCELLANEOUS PROVISIONS.
13. FILING FEES.

#### SUBCHAPTER 1 — GENERAL PROVISIONS

##### SECTION.

- 4-47-101. Short title.  
4-47-102. Definitions.  
4-47-103. Knowledge and notice.  
4-47-104. Nature, purpose, and duration of entity.  
4-47-105. Powers.  
4-47-106. Governing law.  
4-47-107. Supplemental principles of law — Rate of interest.  
4-47-108. Name.  
4-47-109. Reservation of name.  
4-47-110. Effect of partnership agreement — Nonwaivable provisions.

##### SECTION.

- 4-47-111. Required information.  
4-47-112. Business transactions of partner with partnership.  
4-47-113. Dual capacity.  
4-47-114. Office and agent for service of process.  
4-47-115. Change of designated office.  
4-47-116, 4-47-117. [Reserved.]  
4-47-118. Consent and proxies of partners.

**Effective Dates.** Acts 2007, No. 638,  
§ 70: Sept. 1, 2007.

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#### 4-47-101. Short title.

This chapter may be cited as the Uniform Limited Partnership Act (2001).

**History.** Acts 2007, No. 15, § 1.

#### RESEARCH REFERENCES

**Ark. L. Rev.** A License to Lie, Cheat, and Steal? Restriction or Elimination of Fiduciary Duties in Arkansas Limited Liability Companies, 60 Ark. L. Rev. 643.

#### 4-47-102. Definitions.

In this chapter:

(1) “Certificate of limited partnership” means the certificate required by § 4-47-201. The term includes the certificate as amended or restated.

(2) “Contribution”, except in the phrase “right of contribution,” means any benefit provided by a person to a limited partnership in order to become a partner or in the person’s capacity as a partner.

(3) “Debtor in bankruptcy” means a person that is the subject of:

(A) an order for relief under Title 11 of the United States Code or a comparable order under a successor statute of general application; or

(B) a comparable order under federal, state, or foreign law governing insolvency.

(4) “Designated office” means:

(A) with respect to a limited partnership, the office that the limited partnership is required to designate and maintain under § 4-47-114; and

(B) with respect to a foreign limited partnership, its principal office.

(5) “Distribution” means a transfer of money or other property from a limited partnership to a partner in the partner’s capacity as a partner or to a transferee on account of a transferable interest owned by the transferee.

(6) “Foreign limited liability limited partnership” means a foreign limited partnership whose general partners have limited liability for the obligations of the foreign limited partnership under a provision similar to § 4-47-404(c).

(7) “Foreign limited partnership” means a partnership formed under the laws of a jurisdiction other than this State and required by those laws to have one or more general partners and one or more limited partners. The term includes a foreign limited liability limited partnership.

(8) "General partner" means:

(A) with respect to a limited partnership, a person that:

(i) becomes a general partner under § 4-47-401; or

(ii) was a general partner in a limited partnership when the limited partnership became subject to this chapter under § 4-47-1206(a) or (b); and

(B) with respect to a foreign limited partnership, a person that has rights, powers, and obligations similar to those of a general partner in a limited partnership.

(9) "Limited liability limited partnership", except in the phrase "foreign limited liability limited partnership", means a limited partnership whose certificate of limited partnership states that the limited partnership is a limited liability limited partnership.

(10) "Limited partner" means:

(A) with respect to a limited partnership, a person that:

(i) becomes a limited partner under § 4-47-301; or

(ii) was a limited partner in a limited partnership when the limited partnership became subject to this chapter under § 4-47-1206(a) or (b); and

(B) with respect to a foreign limited partnership, a person that has rights, powers, and obligations similar to those of a limited partner in a limited partnership.

(11) "Limited partnership", except in the phrases "foreign limited partnership" and "foreign limited liability limited partnership", means an entity, having one or more general partners and one or more limited partners, which is formed under this chapter by two or more persons or becomes subject to this chapter under subchapter 11 or § 4-47-1206(a) or (b). The term includes a limited liability limited partnership.

(12) "Partner" means a limited partner or general partner.

(13) "Partnership agreement" means the partners' agreement, whether oral, implied, in a record, or in any combination, concerning the limited partnership. The term includes the agreement as amended.

(14) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government; governmental subdivision, agency, or instrumentality; public corporation, or any other legal or commercial entity.

(15) "Person dissociated as a general partner" means a person dissociated as a general partner of a limited partnership.

(16) "Principal office" means the office where the principal executive office of a limited partnership or foreign limited partnership is located, whether or not the office is located in this State.

(17) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(18) "Required information" means the information that a limited partnership is required to maintain under § 4-47-111.

(19) "Sign" means:

(A) to execute or adopt a tangible symbol with the present intent to authenticate a record; or

(B) to attach or logically associate an electronic symbol, sound, or process to or with a record with the present intent to authenticate the record.

(20) "State" means a State of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(21) "Transfer" includes an assignment, conveyance, deed, bill of sale, lease, mortgage, security interest, encumbrance, gift, and transfer by operation of law.

(22) "Transferable interest" means a partner's right to receive distributions.

(23) "Transferee" means a person to which all or part of a transferable interest has been transferred, whether or not the transferor is a partner.

**History.** Acts 2007, No. 15, § 1; 2007, No. 638, § 56; 2009, No. 814, § 7.

**Amendments.** The 2007 amendment by No. 638 deleted former (4) and redesignated the remaining subdivisions accordingly.

The 2009 amendment inserted (4) and redesignated the subsequent subdivisions accordingly.

**Effective Dates.** Acts 2007, No. 638, § 70: Effective date clause provided: "Effective date. This act takes effect September 1, 2007."

#### 4-47-103. Knowledge and notice.

(a) A person knows a fact if the person has actual knowledge of it.

(b) A person has notice of a fact if the person:

(1) knows of it;

(2) has received a notification of it;

(3) has reason to know it exists from all of the facts known to the person at the time in question; or

(4) has notice of it under subsection (c) or (d).

(c) A certificate of limited partnership on file in the office of the Secretary of State is notice that the partnership is a limited partnership and the persons designated in the certificate as general partners are general partners. Except as otherwise provided in subsection (d), the certificate is not notice of any other fact.

(d) A person has notice of:

(1) another person's dissociation as a general partner, 90 days after the effective date of an amendment to the certificate of limited partnership which states that the other person has dissociated or 90 days after the effective date of a statement of dissociation pertaining to the other person, whichever occurs first;

(2) a limited partnership's dissolution, 90 days after the effective date of an amendment to the certificate of limited partnership stating that the limited partnership is dissolved;

(3) a limited partnership's termination, 90 days after the effective date of a statement of termination;

(4) a limited partnership's conversion under subchapter 11, 90 days after the effective date of the articles of conversion; or

(5) a merger under subchapter 11, 90 days after the effective date of the articles of merger.

(e) A person notifies or gives a notification to another person by taking steps reasonably required to inform the other person in ordinary course, whether or not the other person learns of it.

(f) A person receives a notification when the notification:

(1) comes to the person's attention; or

(2) is delivered at the person's place of business or at any other place held out by the person as a place for receiving communications.

(g) Except as otherwise provided in subsection (h), a person other than an individual knows, has notice, or receives a notification of a fact for purposes of a particular transaction when the individual conducting the transaction for the person knows, has notice, or receives a notification of the fact, or in any event when the fact would have been brought to the individual's attention if the person had exercised reasonable diligence. A person other than an individual exercises reasonable diligence if it maintains reasonable routines for communicating significant information to the individual conducting the transaction for the person and there is reasonable compliance with the routines. Reasonable diligence does not require an individual acting for the person to communicate information unless the communication is part of the individual's regular duties or the individual has reason to know of the transaction and that the transaction would be materially affected by the information.

(h) A general partner's knowledge, notice, or receipt of a notification of a fact relating to the limited partnership is effective immediately as knowledge of, notice to, or receipt of a notification by the limited partnership, except in the case of a fraud on the limited partnership committed by or with the consent of the general partner. A limited partner's knowledge, notice, or receipt of a notification of a fact relating to the limited partnership is not effective as knowledge of, notice to, or receipt of a notification by the limited partnership.

**History.** Acts 2007, No. 15, § 1.

#### **4-47-104. Nature, purpose, and duration of entity.**

(a) A limited partnership is an entity distinct from its partners. A limited partnership is the same entity regardless of whether its certificate states that the limited partnership is a limited liability limited partnership.

(b) A limited partnership may be organized under this chapter for any lawful purpose.

(c) A limited partnership has a perpetual duration.

**History.** Acts 2007, No. 15, § 1.

**4-47-105. Powers.**

A limited partnership has the powers to do all things necessary or convenient to carry on its activities, including the power to sue, be sued, and defend in its own name and to maintain an action against a partner for harm caused to the limited partnership by a breach of the partnership agreement or violation of a duty to the partnership.

**History.** Acts 2007, No. 15, § 1.

**4-47-106. Governing law.**

The law of this State governs relations among the partners of a limited partnership and between the partners and the limited partnership and the liability of partners as partners for an obligation of the limited partnership.

**History.** Acts 2007, No. 15, § 1.

**4-47-107. Supplemental principles of law — Rate of interest.**

(a) Unless displaced by particular provisions of this chapter, the principles of law and equity supplement this chapter.

(b) If an obligation to pay interest arises under this chapter and the rate is not specified, the rate is that specified in Arkansas Constitution Article 19, § 13, as amended by Amendment 60.

**History.** Acts 2007, No. 15, § 1.

**4-47-108. Name.**

(a) The name of a limited partnership may contain the name of any partner.

(b) The name of a limited partnership that is not a limited liability limited partnership must contain the phrase “limited partnership” or the abbreviation “L.P.” or “LP” and may not contain the phrase “limited liability limited partnership” or the abbreviation “LLLP” or “L.L.L.P.”.

(c) The name of a limited liability limited partnership must contain the phrase “limited liability limited partnership” or the abbreviation “LLLP” or “L.L.L.P.” and must not contain the abbreviation “L.P.” or “LP.”

(d) Unless authorized by subsection (e), the name of a limited partnership must be distinguishable in the records of the Secretary of State from:

(1) the name of each person other than an individual incorporated, organized, or authorized to transact business in this State; and

(2) each name reserved under § 4-47-109 or other state laws allowing the reservation or registration of business names, including fictitious name statutes.

(e) A limited partnership may apply to the Secretary of State for authorization to use a name that does not comply with subsection (d).

The Secretary of State shall authorize use of the name applied for if, as to each conflicting name:

(1) the present user, registrant, or owner of the conflicting name consents in a signed record to the use and submits an undertaking in a form satisfactory to the Secretary of State to change the conflicting name to a name that complies with subsection (d) and is distinguishable in the records of the Secretary of State from the name applied for;

(2) the applicant delivers to the Secretary of State a certified copy of the final judgment of a court of competent jurisdiction establishing the applicant's right to use in this State the name applied for; or

(3) the applicant delivers to the Secretary of State proof satisfactory to the Secretary of State that the present user, registrant, or owner of the conflicting name:

(A) has merged into the applicant;

(B) has been converted into the applicant; or

(C) has transferred substantially all of its assets, including the conflicting name, to the applicant.

(f) Subject to § 4-47-905, this section applies to any foreign limited partnership transacting business in this State, having a certificate of authority to transact business in this State, or applying for a certificate of authority.

**History.** Acts 2007, No. 15, § 1.

#### **4-47-109. Reservation of name.**

(a) The exclusive right to the use of a name that complies with § 4-47-108 may be reserved by:

(1) a person intending to organize a limited partnership under this chapter and to adopt the name;

(2) a limited partnership or a foreign limited partnership authorized to transact business in this State intending to adopt the name;

(3) a foreign limited partnership intending to obtain a certificate of authority to transact business in this State and adopt the name;

(4) a person intending to organize a foreign limited partnership and intending to have it obtain a certificate of authority to transact business in this State and adopt the name;

(5) a foreign limited partnership formed under the name; or

(6) a foreign limited partnership formed under a name that does not comply with § 4-47-108(b) or (c), but the name reserved under this paragraph may differ from the foreign limited partnership's name only to the extent necessary to comply with § 4-47-108(b) and (c).

(b) A person may apply to reserve a name under subsection (a) by delivering to the Secretary of State for filing an application that states the name to be reserved and the paragraph of subsection (a) which applies. If the Secretary of State finds that the name is available for use by the applicant, the Secretary of State shall file a statement of name reservation and thereby reserve the name for the exclusive use of the applicant for 120 days.

(c) An applicant that has reserved a name pursuant to subsection (b) may reserve the same name for additional 120-day periods. A person having a current reservation for a name may not apply for another 120-day period for the same name until 90 days have elapsed in the current reservation.

(d) A person that has reserved a name under this section may deliver to the Secretary of State for filing a notice of transfer that states the reserved name, the name and street and mailing address of some other person to which the reservation is to be transferred, and the paragraph of subsection (a) which applies to the other person. Subject to § 4-47-206(c), the transfer is effective when the Secretary of State files the notice of transfer.

**History.** Acts 2007, No. 15, § 1.

#### **4-47-110. Effect of partnership agreement — Nonwaivable provisions.**

(a) Except as otherwise provided in subsection (b), the partnership agreement governs relations among the partners and between the partners and the partnership. To the extent the partnership agreement does not otherwise provide, this chapter governs relations among the partners and between the partners and the partnership.

(b) A partnership agreement may not:

(1) vary a limited partnership's power under § 4-47-105 to sue, be sued, and defend in its own name;

(2) vary the law applicable to a limited partnership under § 4-47-106;

(3) vary the requirements of § 4-47-204;

(4) vary the information required under § 4-47-111 or unreasonably restrict the right to information under § 4-47-304 or § 4-47-407, but the partnership agreement may impose reasonable restrictions on the availability and use of information obtained under those sections and may define appropriate remedies, including liquidated damages, for a breach of any reasonable restriction on use;

(5) eliminate the duty of loyalty under § 4-47-408, but the partnership agreement may:

(A) identify specific types or categories of activities that do not violate the duty of loyalty, if not manifestly unreasonable; and

(B) specify the number or percentage of partners which may authorize or ratify, after full disclosure to all partners of all material facts, a specific act or transaction that otherwise would violate the duty of loyalty;

(6) unreasonably reduce the duty of care under § 4-47-408(c);

(7) eliminate the obligation of good faith and fair dealing under §§ 4-47-305(b) and 4-47-408(d), but the partnership agreement may prescribe the standards by which the performance of the obligation is to be measured, if the standards are not manifestly unreasonable;

(8) vary the power of a person to dissociate as a general partner under § 4-47-604(a) except to require that the notice under § 4-47-603(1) be in a record;

(9) vary the power of a court to decree dissolution in the circumstances specified in § 4-47-802;

(10) vary the requirement to wind up the partnership's business as specified in § 4-47-803;

(11) unreasonably restrict the right to maintain an action under subchapter 10;

(12) restrict the right of a partner under § 4-47-1110(a) to approve a conversion or merger or the right of a general partner under § 4-47-1110(b) to consent to an amendment to the certificate of limited partnership which deletes a statement that the limited partnership is a limited liability limited partnership; or

(13) restrict rights under this chapter of a person other than a partner or a transferee.

**History.** Acts 2007, No. 15, § 1.

#### **4-47-111. Required information.**

A limited partnership shall maintain at its designated office the following information:

(1) a current list showing the full name and last known street and mailing address of each partner, separately identifying the general partners, in alphabetical order, and the limited partners, in alphabetical order;

(2) a copy of the initial certificate of limited partnership and all amendments to and restatements of the certificate, together with signed copies of any powers of attorney under which any certificate, amendment, or restatement has been signed;

(3) a copy of any filed articles of conversion or merger;

(4) a copy of the limited partnership's federal, state, and local income tax returns and reports, if any, for the three most recent years;

(5) a copy of any partnership agreement made in a record and any amendment made in a record to any partnership agreement;

(6) a copy of any financial statement of the limited partnership for the three most recent years;

(7) a copy of the three most recent annual reports delivered by the limited partnership to the Secretary of State pursuant to § 4-47-210;

(8) a copy of any record made by the limited partnership during the past three years of any consent given by or vote taken of any partner pursuant to this chapter or the partnership agreement; and

(9) unless contained in a partnership agreement made in a record, a record stating:

(A) the amount of cash, and a description and statement of the agreed value of the other benefits, contributed and agreed to be contributed by each partner;

(B) the times at which, or events on the happening of which, any additional contributions agreed to be made by each partner are to be made;

(C) for any person that is both a general partner and a limited partner, a specification of what transferable interest the person owns in each capacity; and

(D) any events upon the happening of which the limited partnership is to be dissolved and its activities wound up.

**History.** Acts 2007, No. 15, § 1.

#### **4-47-112. Business transactions of partner with partnership.**

A partner may lend money to and transact other business with the limited partnership and has the same rights and obligations with respect to the loan or other transaction as a person that is not a partner.

**History.** Acts 2007, No. 15, § 1.

#### **4-47-113. Dual capacity.**

A person may be both a general partner and a limited partner. A person that is both a general and limited partner has the rights, powers, duties, and obligations provided by this chapter and the partnership agreement in each of those capacities. When the person acts as a general partner, the person is subject to the obligations, duties and restrictions under this chapter and the partnership agreement for general partners. When the person acts as a limited partner, the person is subject to the obligations, duties and restrictions under this chapter and the partnership agreement for limited partners.

**History.** Acts 2007, No. 15, § 1.

#### **4-47-114. Office and agent for service of process.**

(a) A limited partnership shall designate and continuously maintain in this State:

(1) an office, which need not be a place of its activity in this State; and

(2) an agent for service of process.

(b) A foreign limited partnership shall designate and continuously maintain in this State an agent for service of process.

(c) The Model Registered Agents Act, § 4-20-101 et seq.:

(1) Governs the appointment, authority, powers, duties, termination of appointment, and all other provisions concerning an agent for service of process of a limited partnership or foreign limited partnership; and

(2) May be used to obtain service of process upon a limited partnership or foreign limited partnership.

**History.** Acts 2009, No. 814, § 8.

**A.C.R.C. Notes.** Pursuant to § 1-2-

207, the repeal of § 4-47-114 by Acts 2007, No. 638, § 57, supersedes its enactment

by Acts 2007, No. 15. Section 4-47-114 was enacted by Acts 2007, No. 15, § 1, to read as follows:

**“4-47-114. Office and agent for service of process.**

“(a) A limited partnership shall designate and continuously maintain in this State:

“(1) an office, which need not be a place of its activity in this State; and

“(2) an agent for service of process.

“(b) A foreign limited partnership shall designate and continuously maintain in this State an agent for service of process.

“(c) An agent for service of process of a limited partnership or foreign limited partnership must be an individual who is a resident of this State or other person authorized to do business in this State.”

Pursuant to § 1-2-207, the repeal of § 4-47-115 by Acts 2007, No. 638, § 57 supersedes its enactment by Acts 2007, No. 15, § 1. Section 4-47-115 was enacted by Acts 2007, No. 15, § 1 to read as follows:

**“4-47-115. Change of designated office or agent for service of process.**

“(a) In order to change its designated office, agent for service of process, or the address of its agent for service of process, a limited partnership or a foreign limited partnership may deliver to the Secretary of State for filing a statement of change containing:

“(1) the name of the limited partnership or foreign limited partnership;

“(2) the street and mailing address of its current designated office;

“(3) if the current designated office is to be changed, the street and mailing address of the new designated office;

“(4) the name and street and mailing address of its current agent for service of process; and

“(5) if the current agent for service of process or an address of the agent is to be changed, the new information.

“(b) Subject to § 4-47-206(c), a statement of change is effective when filed by the Secretary of State.”

Pursuant to § 1-2-207, the repeal of § 4-47-116 by Acts 2007, No. 638, § 57 supersedes its enactment by Acts 2007, No. 15, § 1. Section 4-47-116 was enacted by Acts 2007, No. 15, § 1 to read as follows:

**“4-47-116. Resignation of agent for service of process.**

“(a) In order to resign as an agent for

service of process of a limited partnership or foreign limited partnership, the agent must deliver to the Secretary of State for filing a statement of resignation containing the name of the limited partnership or foreign limited partnership.

“(b) After receiving a statement of resignation, the Secretary of State shall file it and mail a copy to the designated office of the limited partnership or foreign limited partnership and another copy to the principal office if the address of the office appears in the records of the Secretary of State and is different from the address of the designated office.

“(c) An agency for service of process is terminated on the 31st day after the Secretary of State files the statement of resignation.”

Pursuant to § 1-2-207, the repeal of § 4-47-117 by Acts 2007, No. 638, § 57 supersedes its enactment by Acts 2007, No. 15, § 1. Section 4-47-117 was enacted by Acts 2007, No. 15, § 1 to read as follows:

**“4-47-117. Service of process.**

“(a) An agent for service of process appointed by a limited partnership or foreign limited partnership is an agent of the limited partnership or foreign limited partnership for service of any process, notice, or demand required or permitted by law to be served upon the limited partnership or foreign limited partnership.

“(b) If a limited partnership or foreign limited partnership does not appoint or maintain an agent for service of process in this State or the agent for service of process cannot with reasonable diligence be found at the agent's address, the Secretary of State is an agent of the limited partnership or foreign limited partnership upon whom process, notice, or demand may be served.

“(c) Service of any process, notice, or demand on the Secretary of State may be made by delivering to and leaving with the Secretary of State duplicate copies of the process, notice, or demand. If a process, notice, or demand is served on the Secretary of State, the Secretary of State shall forward one of the copies by registered or certified mail, return receipt requested, to the limited partnership or foreign limited partnership at its designated office.

“(d) Service is effected under subsection (c) at the earliest of:

“(1) the date the limited partnership or foreign limited partnership receives the process, notice, or demand;

“(2) the date shown on the return receipt, if signed on behalf of the limited partnership or foreign limited partnership; or

“(3) five days after the process, notice, or demand is deposited in the mail, if mailed postpaid and correctly addressed.

“(e) The Secretary of State shall keep a record of each process, notice, and demand served pursuant to this section and record the time of, and the action taken regard-

ing, the service.

“(f) This section does not affect the right to serve process, notice, or demand in any other manner provided by law.”

**Publisher's Notes.** These sections, concerning agents for service of process, were repealed by Acts 2007, No. 638, § 57. They were derived from the following sources:

4-47-114. Acts 2007, No. 15, § 1.

4-47-115. Acts 2007, No. 15, § 1.

4-47-116. Acts 2007, No. 15, § 1.

4-47-117. Acts 2007, No. 15, § 1.

**Effective Dates.** Acts 2007, No. 638 § 70 provided: “Effective date. This act takes effect September 1, 2007.”

#### **4-47-115. Change of designated office.**

(a) In order to change its designated office, a limited partnership or a foreign limited partnership may deliver to the Secretary of State for filing a statement of change containing:

(1) the name of the limited partnership or foreign limited partnership;

(2) the street and mailing address of its current designated office; and

(3) if the current designated office is to be changed, the street and mailing address of the new designated office.

(4) [Reserved.]

(5) [Reserved.]

(b) Subject to § 4-47-206(c), a statement of change is effective when filed by the Secretary of State.

**History.** Acts 2009, No. 814, § 8.

#### **4-47-116, 4-47-117. [Reserved.]**

#### **4-47-118. Consent and proxies of partners.**

Action requiring the consent of partners under this chapter may be taken without a meeting, and a partner may appoint a proxy to consent or otherwise act for the partner by signing an appointment record, either personally or by the partner's attorney in fact.

**History.** Acts 2007, No. 15, § 1.

### **SUBCHAPTER 2 — FORMATION — CERTIFICATE OF LIMITED PARTNERSHIP AND OTHER FILINGS**

#### **SECTION.**

4-47-201. Formation of limited partnership — Certificate of limited partnership.

#### **SECTION.**

4-47-202. Amendment or restatement of certificate.

4-47-203. Statement of termination.

## SECTION.

- 4-47-204. Signing of records.  
4-47-205. Signing and filing pursuant to judicial order.  
4-47-206. Delivery to and filing of records by Secretary of State — Effective time and date.  
4-47-207. Correcting filed record.

## SECTION.

- 4-47-208. Liability for false information in filed record.  
4-47-209. Certificate of existence or authorization.  
4-47-210. Annual report for Secretary of State.

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**Effective Dates.** Acts 2007, No. 638,  
§ 70: Sept. 1, 2007.

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### **4-47-201. Formation of limited partnership — Certificate of limited partnership.**

(a) In order for a limited partnership to be formed, a certificate of limited partnership must be delivered to the Secretary of State for filing. The certificate must state:

(1) the name of the limited partnership, which must comply with § 4-47-108;

(2) the street and mailing address of the initial designated office and the information concerning the limited partnership's agent for service of process required by § 4-20-105(a);

(3) the name and the street and mailing address of each general partner;

(4) whether the limited partnership is a limited liability limited partnership; and

(5) any additional information required by subchapter 11.

(b) A certificate of limited partnership may also contain any other matters but may not vary or otherwise affect the provisions specified in § 4-47-110(b) in a manner inconsistent with that section.

(c) If there has been substantial compliance with subsection (a), subject to § 4-47-206(c) a limited partnership is formed when the Secretary of State files the certificate of limited partnership.

(d) Subject to subsection (b), if any provision of a partnership agreement is inconsistent with the filed certificate of limited partnership or with a filed statement of dissociation, termination, or change or filed articles of conversion or merger:

(1) the partnership agreement prevails as to partners and transferees; and

(2) the filed certificate of limited partnership, statement of dissociation, termination, or change or articles of conversion or merger prevail as to persons, other than partners and transferees, that reasonably rely on the filed record to their detriment.

**History.** Acts 2007, No. 15, § 1; 2007, No. 638, § 58; 2009, No. 814, § 9.

**Amendments.** The 2007 amendment by No 638 substituted "the information

required by § 4-20-105(a)” for “the street and mailing address of the initial designated office and the name and street and mailing address of the initial agent for service of process” in (a)(2).

The 2009 amendment rewrote (a)(2), which read: “the information required by § 4-20-105(a).”

**Effective Dates.** Acts 2007, No. 638, § 70: Effective date clause provided: “Effective date. This act takes effect September 1, 2007.”

#### **4-47-202. Amendment or restatement of certificate.**

(a) In order to amend its certificate of limited partnership, a limited partnership must deliver to the Secretary of State for filing an amendment or, pursuant to subchapter 11, articles of merger stating:

- (1) the name of the limited partnership;
- (2) the date of filing of its initial certificate; and
- (3) the changes the amendment makes to the certificate as most recently amended or restated.

(b) A limited partnership shall promptly deliver to the Secretary of State for filing an amendment to a certificate of limited partnership to reflect:

- (1) the admission of a new general partner;
- (2) the dissociation of a person as a general partner; or
- (3) the appointment of a person to wind up the limited partnership’s activities under § 4-47-803(c) or (d).

(c) A general partner that knows that any information in a filed certificate of limited partnership was false when the certificate was filed or has become false due to changed circumstances shall promptly:

- (1) cause the certificate to be amended; or
- (2) if appropriate, deliver to the Secretary of State for filing a statement of correction pursuant to § 4-47-207 or § 4-20-108.

(d) A certificate of limited partnership may be amended at any time for any other proper purpose as determined by the limited partnership.

(e) A restated certificate of limited partnership may be delivered to the Secretary of State for filing in the same manner as an amendment.

(f) Subject to § 4-47-206(c), an amendment or restated certificate is effective when filed by the Secretary of State.

**History.** Acts 2007, No. 15, § 1; 2007, No. 638, § 59.

**Amendments.** The 2007 amendment by No. 638, in (c)(2), deleted “a statement of change pursuant to § 4-47-115 or” following “filing,” and added “or § 4-20-108.”

**Effective Dates.** Acts 2007, No. 638, § 70: Effective date clause provided: “Effective date. This act takes effect September 1, 2007.”

#### **4-47-203. Statement of termination.**

A dissolved limited partnership that has completed winding up may deliver to the Secretary of State for filing a statement of termination that states:

- (1) the name of the limited partnership;

- (2) the date of filing of its initial certificate of limited partnership; and
- (3) any other information as determined by the general partners filing the statement or by a person appointed pursuant to § 4-47-803(c) or (d).

**History.** Acts 2007, No. 15, § 1.

#### **4-47-204. Signing of records.**

(a) Each record delivered to the Secretary of State for filing pursuant to this chapter must be signed in the following manner:

(1) An initial certificate of limited partnership must be signed by all general partners listed in the certificate.

(2) An amendment adding or deleting a statement that the limited partnership is a limited liability limited partnership must be signed by all general partners listed in the certificate.

(3) An amendment designating as general partner a person admitted under § 4-47-801(3)(B) following the dissociation of a limited partnership's last general partner must be signed by that person.

(4) An amendment required by § 4-47-803(c) following the appointment of a person to wind up the dissolved limited partnership's activities must be signed by that person.

(5) Any other amendment must be signed by:

(A) at least one general partner listed in the certificate;

(B) each other person designated in the amendment as a new general partner; and

(C) each person that the amendment indicates has dissociated as a general partner, unless:

(i) the person is deceased or a guardian or general conservator has been appointed for the person and the amendment so states; or

(ii) the person has previously delivered to the Secretary of State for filing a statement of dissociation.

(6) A restated certificate of limited partnership must be signed by at least one general partner listed in the certificate, and, to the extent the restated certificate effects a change under any other paragraph of this subsection, the certificate must be signed in a manner that satisfies that paragraph.

(7) A statement of termination must be signed by all general partners listed in the certificate or, if the certificate of a dissolved limited partnership lists no general partners, by the person appointed pursuant to § 4-47-803(c) or (d) to wind up the dissolved limited partnership's activities.

(8) Articles of conversion must be signed by each general partner listed in the certificate of limited partnership.

(9) Articles of merger must be signed as provided in § 4-47-1108(a).

(10) Any other record delivered on behalf of a limited partnership to the Secretary of State for filing must be signed by at least one general partner listed in the certificate.

(11) A statement by a person pursuant to § 4-47-605(a)(4) stating that the person has dissociated as a general partner must be signed by that person.

(12) A statement of withdrawal by a person pursuant to § 4-47-306 must be signed by that person.

(13) A record delivered on behalf of a foreign limited partnership to the Secretary of State for filing must be signed by at least one general partner of the foreign limited partnership.

(14) Any other record delivered on behalf of any person to the Secretary of State for filing must be signed by that person.

(b) Any person may sign by an attorney in fact any record to be filed pursuant to this chapter.

**History.** Acts 2007, No. 15, § 1.

#### **4-47-205. Signing and filing pursuant to judicial order.**

(a) If a person required by this chapter to sign a record or deliver a record to the Secretary of State for filing does not do so, any other person that is aggrieved may petition the circuit court to order:

- (1) the person to sign the record;
- (2) deliver the record to the Secretary of State for filing; or
- (3) the Secretary of State to file the record unsigned.

(b) If the person aggrieved under subsection (a) is not the limited partnership or foreign limited partnership to which the record pertains, the aggrieved person shall make the limited partnership or foreign limited partnership a party to the action. A person aggrieved under subsection (a) may seek the remedies provided in subsection (a) in the same action in combination or in the alternative.

(c) A record filed unsigned pursuant to this section is effective without being signed.

**History.** Acts 2007, No. 15, § 1.

#### **4-47-206. Delivery to and filing of records by Secretary of State — Effective time and date.**

(a) A record authorized or required to be delivered to the Secretary of State for filing under this chapter must be captioned to describe the record's purpose, be in a medium permitted by the Secretary of State, and be delivered to the Secretary of State. Unless the Secretary of State determines that a record does not comply with the filing requirements of this chapter, and if all filing fees have been paid, the Secretary of State shall file the record and:

- (1) for a statement of dissociation, send:

(A) a copy of the filed statement and a receipt for the fees to the person which the statement indicates has dissociated as a general partner; and

(B) a copy of the filed statement and receipt to the limited partnership;

(2) for a statement of withdrawal, send:

(A) a copy of the filed statement and a receipt for the fees to the person on whose behalf the record was filed; and

(B) if the statement refers to an existing limited partnership, a copy of the filed statement and receipt to the limited partnership; and

(3) for all other records, send a copy of the filed record and a receipt for the fees to the person on whose behalf the record was filed.

(b) Upon request and payment of a fee, the Secretary of State shall send to the requester a certified copy of the requested record.

(c) Except as otherwise provided in § 4-47-207, a record delivered to the Secretary of State for filing under this chapter may specify an effective time and a delayed effective date. Except as otherwise provided in this chapter, a record filed by the Secretary of State is effective:

(1) if the record does not specify an effective time and does not specify a delayed effective date, on the date and at the time the record is filed as evidenced by the Secretary of State's endorsement of the date and time on the record;

(2) if the record specifies an effective time but not a delayed effective date, on the date the record is filed at the time specified in the record;

(3) if the record specifies a delayed effective date but not an effective time, at 12:01 a.m. on the earlier of:

(A) the specified date; or

(B) the 90th day after the record is filed; or

(4) if the record specifies an effective time and a delayed effective date, at the specified time on the earlier of:

(A) the specified date; or

(B) the 90th day after the record is filed.

**History.** Acts 2007, No. 15, § 1; 2007, No. 638, § 60.

**Amendments.** The 2007 amendment by No. 638 deleted "4-47-116" preceding "§ 4-47-207" in (c), and made related changes.

**Effective Dates.** Acts 2007, No. 638, § 70: Effective date clause provided: "Effective date. This act takes effect September 1, 2007."

#### 4-47-207. Correcting filed record.

(a) A limited partnership or foreign limited partnership may deliver to the Secretary of State for filing a statement of correction to correct a record previously delivered by the limited partnership or foreign limited partnership to the Secretary of State and filed by the Secretary of State, if at the time of filing the record contained false or erroneous information or was defectively signed.

(b) A statement of correction may not state a delayed effective date and must:

(1) describe the record to be corrected, including its filing date, or attach a copy of the record as filed;

(2) specify the incorrect information and the reason it is incorrect or the manner in which the signing was defective; and

(3) correct the incorrect information or defective signature.

(c) When filed by the Secretary of State, a statement of correction is effective retroactively as of the effective date of the record the statement corrects, but the statement is effective when filed:

- (1) for the purposes of § 4-47-103(c) and (d); and
- (2) as to persons relying on the uncorrected record and adversely affected by the correction.

**History.** Acts 2007, No. 15, § 1.

#### **4-47-208. Liability for false information in filed record.**

(a) If a record delivered to the Secretary of State for filing under this chapter and filed by the Secretary of State contains false information, a person that suffers loss by reliance on the information may recover damages for the loss from:

(1) a person that signed the record, or caused another to sign it on the person's behalf, and knew the information to be false at the time the record was signed; and

(2) a general partner that has notice that the information was false when the record was filed or has become false because of changed circumstances, if the general partner has notice for a reasonably sufficient time before the information is relied upon to enable the general partner to effect an amendment under § 4-47-202, file a petition pursuant to § 4-47-205, or deliver to the Secretary of State for filing a statement of change pursuant to § 4-20-108 or a statement of correction pursuant to § 4-47-207.

(b) Signing a record authorized or required to be filed under this chapter constitutes an affirmation under the penalties of perjury that the facts stated in the record are true.

**History.** Acts 2007, No. 15, § 1; 2007, No. 638, § 61.

**Amendments.** The 2007 amendment by No. 638 substituted "§ 4-47-115" in (a)(2).

**Effective Dates.** Acts 2007, No. 638, § 70: Effective date clause provided: "Effective date. This act takes effect September 1, 2007."

#### **4-47-209. Certificate of existence or authorization.**

(a) The Secretary of State, upon request and payment of the requisite fee, shall furnish a certificate of existence for a limited partnership if the records filed in the office of the Secretary of State show that the Secretary of State has filed a certificate of limited partnership and has not filed a statement of termination. A certificate of existence must state:

- (1) the limited partnership's name;
- (2) that it was duly formed under the laws of this State and the date of formation;
- (3) whether all fees, taxes, and penalties due to the Secretary of State under this chapter or other law have been paid;

(4) whether the limited partnership's most recent annual report required by § 4-47-210 has been filed by the Secretary of State;

(5) whether the Secretary of State has administratively dissolved the limited partnership;

(6) whether the limited partnership's certificate of limited partnership has been amended to state that the limited partnership is dissolved;

(7) that a statement of termination has not been filed by the Secretary of State; and

(8) other facts of record in the office of the Secretary of State which may be requested by the applicant.

(b) The Secretary of State, upon request and payment of the requisite fee, shall furnish a certificate of authorization for a foreign limited partnership if the records filed in the office of the Secretary of State show that the Secretary of State has filed a certificate of authority, has not revoked the certificate of authority, and has not filed a notice of cancellation. A certificate of authorization must state:

(1) the foreign limited partnership's name and any alternate name adopted under § 4-47-905(a) for use in this State;

(2) that it is authorized to transact business in this State;

(3) whether all fees, taxes, and penalties due to the Secretary of State under this chapter or other law have been paid;

(4) whether the foreign limited partnership's most recent annual report required by § 4-47-210 has been filed by the Secretary of State;

(5) that the Secretary of State has not revoked its certificate of authority and has not filed a notice of cancellation; and

(6) other facts of record in the office of the Secretary of State which may be requested by the applicant.

(c) Subject to any qualification stated in the certificate, a certificate of existence or authorization issued by the Secretary of State may be relied upon as conclusive evidence that the limited partnership or foreign limited partnership is in existence or is authorized to transact business in this State.

**History.** Acts 2007, No. 15, § 1.

#### **4-47-210. Annual report for Secretary of State.**

(a) A limited partnership or a foreign limited partnership authorized to transact business in this State shall deliver to the Secretary of State for filing an annual report that states:

(1) the name of the limited partnership or foreign limited partnership;

(2) the street and mailing address of its designated office and the information concerning its agent for service of process required by § 4-20-105(a);

(3) in the case of a foreign limited partnership, the street and mailing address of its principal office; and

(4) in the case of a foreign limited partnership, the State or other jurisdiction under whose law the foreign limited partnership is formed and any alternate name adopted under § 4-47-905(a).

(b) Information in an annual report must be current as of the date the annual report is delivered to the Secretary of State for filing.

(c) The first annual report must be delivered to the Secretary of State between January 1 and May 1 of the year following the calendar year in which a limited partnership was formed or a foreign limited partnership was authorized to transact business. An annual report must be delivered to the Secretary of State between January 1 and May 1 of each subsequent calendar year.

(d) If an annual report does not contain the information required in subsection (a), the Secretary of State shall promptly notify the reporting limited partnership or foreign limited partnership and return the report to it for correction. If the report is corrected to contain the information required in subsection (a) and delivered to the Secretary of State within 30 days after the effective date of the notice, it is timely delivered.

(e) If a filed annual report contains an address of the designated office or information provided under subdivision (a)(2) of this section which differs from the information shown in the records of the Secretary of State immediately before the filing, the differing information in the annual report is considered a statement of change under § 4-20-108.

**History.** Acts 2007, No. 15, § 1; 2007, No. 638, § 62; 2009, No. 814, § 10.

**Amendments.** The 2007 amendment by No. 638 substituted “the information required by § 4-20-105(a)” for “the street and mailing address of its designated office and the name and street and mailing address of its agent for service of process in this State” in (a)(2) of this section for “an address of a designated office or the name or address of an agent for service of

process,” and substituted “§ 4-20-108” for “§ 4-47-115.”

The 2009 amendment, in (a), rewrote (a)(2), which read: “the information required by § 4-20-105(a),” and inserted “foreign” in (a)(3); and inserted “an address of the designated office or” in (e).

**Effective Dates.** Acts 2007, No. 638, § 70: Effective date clause provided: “Effective date. This act takes effect September 1, 2007.”

### SUBCHAPTER 3 — LIMITED PARTNERS

#### SECTION.

4-47-301. Becoming limited partner.

4-47-302. No right or power as limited partner to bind limited partnership.

4-47-303. No liability as limited partner for limited partnership obligations.

#### SECTION.

4-47-304. Right of limited partner and former limited partner to information.

4-47-305. Limited duties of limited partners.

4-47-306. Person erroneously believing self to be limited partner.

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**Effective Dates.** Acts 2007, No. 638, § 70: Sept. 1, 2007.

**4-47-301. Becoming limited partner.**

A person becomes a limited partner:

- (1) as provided in the partnership agreement;
- (2) as the result of a conversion or merger under subchapter 11; or
- (3) with the consent of all the partners.

**History.** Acts 2007, No. 15, § 1.

**4-47-302. No right or power as limited partner to bind limited partnership.**

A limited partner does not have the right or the power as a limited partner to act for or bind the limited partnership.

**History.** Acts 2007, No. 15, § 1.

**4-47-303. No liability as limited partner for limited partnership obligations.**

An obligation of a limited partnership, whether arising in contract, tort, or otherwise, is not the obligation of a limited partner. A limited partner is not personally liable, directly or indirectly, by way of contribution or otherwise, for an obligation of the limited partnership solely by reason of being a limited partner, even if the limited partner participates in the management and control of the limited partnership.

**History.** Acts 2007, No. 15, § 1.

**4-47-304. Right of limited partner and former limited partner to information.**

(a) On 10 days' demand, made in a record received by the limited partnership, a limited partner may inspect and copy required information during regular business hours in the limited partnership's designated office. The limited partner need not have any particular purpose for seeking the information.

(b) During regular business hours and at a reasonable location specified by the limited partnership, a limited partner may obtain from the limited partnership and inspect and copy true and full information regarding the state of the activities and financial condition of the limited partnership and other information regarding the activities of the limited partnership as is just and reasonable if:

- (1) the limited partner seeks the information for a purpose reasonably related to the partner's interest as a limited partner;
- (2) the limited partner makes a demand in a record received by the limited partnership, describing with reasonable particularity the information sought and the purpose for seeking the information; and
- (3) the information sought is directly connected to the limited partner's purpose.

(c) Within 10 days after receiving a demand pursuant to subsection (b), the limited partnership in a record shall inform the limited partner that made the demand:

(1) what information the limited partnership will provide in response to the demand;

(2) when and where the limited partnership will provide the information; and

(3) if the limited partnership declines to provide any demanded information, the limited partnership's reasons for declining.

(d) Subject to subsection (f), a person dissociated as a limited partner may inspect and copy required information during regular business hours in the limited partnership's designated office if:

(1) the information pertains to the period during which the person was a limited partner;

(2) the person seeks the information in good faith; and

(3) the person meets the requirements of subsection (b).

(e) The limited partnership shall respond to a demand made pursuant to subsection (d) in the same manner as provided in subsection (c).

(f) If a limited partner dies, § 4-47-704 applies.

(g) The limited partnership may impose reasonable restrictions on the use of information obtained under this section. In a dispute concerning the reasonableness of a restriction under this subsection, the limited partnership has the burden of proving reasonableness.

(h) A limited partnership may charge a person that makes a demand under this section reasonable costs of copying, limited to the costs of labor and material.

(i) Whenever this chapter or a partnership agreement provides for a limited partner to give or withhold consent to a matter, before the consent is given or withheld, the limited partnership shall, without demand, provide the limited partner with all information material to the limited partner's decision that the limited partnership knows.

(j) A limited partner or person dissociated as a limited partner may exercise the rights under this section through an attorney or other agent. Any restriction imposed under subsection (g) or by the partnership agreement applies both to the attorney or other agent and to the limited partner or person dissociated as a limited partner.

(k) The rights stated in this section do not extend to a person as transferee, but may be exercised by the legal representative of an individual under legal disability who is a limited partner or person dissociated as a limited partner.

**History.** Acts 2007, No. 15, § 1; 2007, No. 638, § 63; 2009, No. 814, §§ 11, 12.

**Amendments.** The 2007 amendment by No. 638 substituted "principal office" for "designated office" in (a) and (d).

The 2009 amendment substituted "designated office" for "principal office" in (a) and (d).

**Effective Dates.** Acts 2007, No. 638, § 70, provided: "Effective date. This act takes effect September 1, 2007."

**4-47-305. Limited duties of limited partners.**

(a) A limited partner does not have any fiduciary duty to the limited partnership or to any other partner solely by reason of being a limited partner.

(b) A limited partner shall discharge the duties to the partnership and the other partners under this chapter or under the partnership agreement and exercise any rights consistently with the obligation of good faith and fair dealing.

(c) A limited partner does not violate a duty or obligation under this chapter or under the partnership agreement merely because the limited partner's conduct furthers the limited partner's own interest.

**History.** Acts 2007, No. 15, § 1.

**4-47-306. Person erroneously believing self to be limited partner.**

(a) Except as otherwise provided in subsection (b), a person that makes an investment in a business enterprise and erroneously but in good faith believes that the person has become a limited partner in the enterprise is not liable for the enterprise's obligations by reason of making the investment, receiving distributions from the enterprise, or exercising any rights of or appropriate to a limited partner, if, on ascertaining the mistake, the person:

(1) causes an appropriate certificate of limited partnership, amendment, or statement of correction to be signed and delivered to the Secretary of State for filing; or

(2) withdraws from future participation as an owner in the enterprise by signing and delivering to the Secretary of State for filing a statement of withdrawal under this section.

(b) A person that makes an investment described in subsection (a) is liable to the same extent as a general partner to any third party that enters into a transaction with the enterprise, believing in good faith that the person is a general partner, before the Secretary of State files a statement of withdrawal, certificate of limited partnership, amendment, or statement of correction to show that the person is not a general partner.

(c) If a person makes a diligent effort in good faith to comply with subsection (a)(1) and is unable to cause the appropriate certificate of limited partnership, amendment, or statement of correction to be signed and delivered to the Secretary of State for filing, the person has the right to withdraw from the enterprise pursuant to subsection (a)(2) even if the withdrawal would otherwise breach an agreement with others that are or have agreed to become co-owners of the enterprise.

**History.** Acts 2007, No. 15, § 1.

**SUBCHAPTER 4 — GENERAL PARTNERS**

## SECTION.

4-47-401. Becoming general partner.

4-47-402. General partner agent of limited partnership.

4-47-403. Limited partnership liable for general partner's actionable conduct.

4-47-404. General partner's liability.

4-47-405. Actions by and against partnership and partners.

## SECTION.

4-47-406. Management rights of general partner.

4-47-407. Right of general partner and former general partner to information.

4-47-408. General standards of general partner's conduct.

**4-47-401. Becoming general partner.**

A person becomes a general partner:

- (1) as provided in the partnership agreement;
- (2) under § 4-47-801(3)(B) following the dissociation of a limited partnership's last general partner;
- (3) as the result of a conversion or merger under subchapter 11; or
- (4) with the consent of all the partners.

**History.** Acts 2007, No. 15, § 1.

**4-47-402. General partner agent of limited partnership.**

(a) Each general partner is an agent of the limited partnership for the purposes of its activities. An act of a general partner, including the signing of a record in the partnership's name, for apparently carrying on in the ordinary course the limited partnership's activities or activities of the kind carried on by the limited partnership binds the limited partnership, unless the general partner did not have authority to act for the limited partnership in the particular matter and the person with which the general partner was dealing knew, had received a notification, or had notice under § 4-47-103(d) that the general partner lacked authority.

(b) An act of a general partner which is not apparently for carrying on in the ordinary course the limited partnership's activities or activities of the kind carried on by the limited partnership binds the limited partnership only if the act was actually authorized by all the other partners.

**History.** Acts 2007, No. 15, § 1.

**4-47-403. Limited partnership liable for general partner's actionable conduct.**

(a) A limited partnership is liable for loss or injury caused to a person, or for a penalty incurred, as a result of a wrongful act or omission, or other actionable conduct, of a general partner acting in the ordinary course of activities of the limited partnership or with authority of the limited partnership.

(b) If, in the course of the limited partnership's activities or while acting with authority of the limited partnership, a general partner receives or causes the limited partnership to receive money or property of a person not a partner, and the money or property is misapplied by a general partner, the limited partnership is liable for the loss.

**History.** Acts 2007, No. 15, § 1.

#### **4-47-404. General partner's liability.**

(a) Except as otherwise provided in subsections (b) and (c), all general partners are liable jointly and severally for all obligations of the limited partnership unless otherwise agreed by the claimant or provided by law.

(b) A person that becomes a general partner of an existing limited partnership is not personally liable for an obligation of a limited partnership incurred before the person became a general partner.

(c) An obligation of a limited partnership incurred while the limited partnership is a limited liability limited partnership, whether arising in contract, tort, or otherwise, is solely the obligation of the limited partnership. A general partner is not personally liable, directly or indirectly, by way of contribution or otherwise, for such an obligation solely by reason of being or acting as a general partner. This subsection applies despite anything inconsistent in the partnership agreement that existed immediately before the consent required to become a limited liability limited partnership under § 4-47-406(b)(2).

**History.** Acts 2007, No. 15, § 1.

#### **4-47-405. Actions by and against partnership and partners.**

(a) To the extent not inconsistent with § 4-47-404, a general partner may be joined in an action against the limited partnership or named in a separate action.

(b) A judgment against a limited partnership is not by itself a judgment against a general partner. A judgment against a limited partnership may not be satisfied from a general partner's assets unless there is also a judgment against the general partner.

(c) A judgment creditor of a general partner may not levy execution against the assets of the general partner to satisfy a judgment based on a claim against the limited partnership, unless the partner is personally liable for the claim under § 4-47-404 and:

(1) a judgment based on the same claim has been obtained against the limited partnership and a writ of execution on the judgment has been returned unsatisfied in whole or in part;

(2) the limited partnership is a debtor in bankruptcy;

(3) the general partner has agreed that the creditor need not exhaust limited partnership assets;

(4) a court grants permission to the judgment creditor to levy execution against the assets of a general partner based on a finding that

limited partnership assets subject to execution are clearly insufficient to satisfy the judgment, that exhaustion of limited partnership assets is excessively burdensome, or that the grant of permission is an appropriate exercise of the court's equitable powers; or

(5) liability is imposed on the general partner by law or contract independent of the existence of the limited partnership.

**History.** Acts 2007, No. 15, § 1.

#### **4-47-406. Management rights of general partner.**

(a) Each general partner has equal rights in the management and conduct of the limited partnership's activities. Except as expressly provided in this chapter, any matter relating to the activities of the limited partnership may be exclusively decided by the general partner or, if there is more than one general partner, by a majority of the general partners.

(b) The consent of each partner is necessary to:

(1) amend the partnership agreement;

(2) amend the certificate of limited partnership to add or, subject to § 4-47-1110, delete a statement that the limited partnership is a limited liability limited partnership; and

(3) sell, lease, exchange, or otherwise dispose of all, or substantially all, of the limited partnership's property, with or without the good will, other than in the usual and regular course of the limited partnership's activities.

(c) A limited partnership shall reimburse a general partner for payments made and indemnify a general partner for liabilities incurred by the general partner in the ordinary course of the activities of the partnership or for the preservation of its activities or property.

(d) A limited partnership shall reimburse a general partner for an advance to the limited partnership beyond the amount of capital the general partner agreed to contribute.

(e) A payment or advance made by a general partner which gives rise to an obligation of the limited partnership under subsection (c) or (d) constitutes a loan to the limited partnership which accrues interest from the date of the payment or advance.

(f) A general partner is not entitled to remuneration for services performed for the partnership.

**History.** Acts 2007, No. 15, § 1.

#### **4-47-407. Right of general partner and former general partner to information.**

(a) A general partner, without having any particular purpose for seeking the information, may inspect and copy during regular business hours:

(1) in the limited partnership's designated office, required information; and

(2) at a reasonable location specified by the limited partnership, any other records maintained by the limited partnership regarding the limited partnership's activities and financial condition.

(b) Each general partner and the limited partnership shall furnish to a general partner:

(1) without demand, any information concerning the limited partnership's activities and activities reasonably required for the proper exercise of the general partner's rights and duties under the partnership agreement or this chapter; and

(2) on demand, any other information concerning the limited partnership's activities, except to the extent the demand or the information demanded is unreasonable or otherwise improper under the circumstances.

(c) Subject to subsection (e), on 10 days' demand made in a record received by the limited partnership, a person dissociated as a general partner may have access to the information and records described in subsection (a) at the location specified in subsection (a) if:

(1) the information or record pertains to the period during which the person was a general partner;

(2) the person seeks the information or record in good faith; and

(3) the person satisfies the requirements imposed on a limited partner by § 4-47-304(b).

(d) The limited partnership shall respond to a demand made pursuant to subsection (c) in the same manner as provided in § 4-47-304(c).

(e) If a general partner dies, § 4-47-704 applies.

(f) The limited partnership may impose reasonable restrictions on the use of information under this section. In any dispute concerning the reasonableness of a restriction under this subsection, the limited partnership has the burden of proving reasonableness.

(g) A limited partnership may charge a person dissociated as a general partner that makes a demand under this section reasonable costs of copying, limited to the costs of labor and material.

(h) A general partner or person dissociated as a general partner may exercise the rights under this section through an attorney or other agent. Any restriction imposed under subsection (f) or by the partnership agreement applies both to the attorney or other agent and to the general partner or person dissociated as a general partner.

(i) The rights under this section do not extend to a person as transferee, but the rights under subsection (c) of a person dissociated as a general partner may be exercised by the legal representative of an individual who dissociated as a general partner under § 4-47-603(7)(B) or (C).

**History.** Acts 2007, No. 15, § 1.

**4-47-408. General standards of general partner's conduct.**

(a) The only fiduciary duties that a general partner has to the limited partnership and the other partners are the duties of loyalty and care under subsections (b) and (c).

(b) A general partner's duty of loyalty to the limited partnership and the other partners is limited to the following:

(1) to account to the limited partnership and hold as trustee for it any property, profit, or benefit derived by the general partner in the conduct and winding up of the limited partnership's activities or derived from a use by the general partner of limited partnership property, including the appropriation of a limited partnership opportunity;

(2) to refrain from dealing with the limited partnership in the conduct or winding up of the limited partnership's activities as or on behalf of a party having an interest adverse to the limited partnership; and

(3) to refrain from competing with the limited partnership in the conduct or winding up of the limited partnership's activities.

(c) A general partner's duty of care to the limited partnership and the other partners in the conduct and winding up of the limited partnership's activities is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.

(d) A general partner shall discharge the duties to the partnership and the other partners under this chapter or under the partnership agreement and exercise any rights consistently with the obligation of good faith and fair dealing.

(e) A general partner does not violate a duty or obligation under this chapter or under the partnership agreement merely because the general partner's conduct furthers the general partner's own interests.

**History.** Acts 2007, No. 15, § 1.

**SUBCHAPTER 5 — CONTRIBUTIONS AND DISTRIBUTIONS****SECTION.**

- 4-47-501. Form of contribution.
- 4-47-502. Liability for contribution.
- 4-47-503. Sharing of distributions.
- 4-47-504. Interim distributions.
- 4-47-505. No distribution on account of dissociation.

**SECTION.**

- 4-47-506. Distribution in kind.
- 4-47-507. Right to distribution.
- 4-47-508. Limitations on distribution.
- 4-47-509. Liability for improper distributions.

**4-47-501. Form of contribution.**

A contribution of a partner may consist of tangible or intangible property or other benefit to the limited partnership, including money, services performed, promissory notes, other agreements to contribute cash or property, and contracts for services to be performed.

**History.** Acts 2007, No. 15, § 1.

#### **4-47-502. Liability for contribution.**

(a) A partner's obligation to contribute money or other property or other benefit to, or to perform services for, a limited partnership is not excused by the partner's death, disability, or other inability to perform personally.

(b) If a partner does not make a promised non-monetary contribution, the partner is obligated at the option of the limited partnership to contribute money equal to that portion of the value, as stated in the required information, of the stated contribution which has not been made.

(c) The obligation of a partner to make a contribution or return money or other property paid or distributed in violation of this chapter may be compromised only by consent of all partners. A creditor of a limited partnership which extends credit or otherwise acts in reliance on an obligation described in subsection (a), without notice of any compromise under this subsection, may enforce the original obligation.

**History.** Acts 2007, No. 15, § 1.

#### **4-47-503. Sharing of distributions.**

A distribution by a limited partnership must be shared among the partners on the basis of the value, as stated in the required records when the limited partnership decides to make the distribution, of the contributions the limited partnership has received from each partner.

**History.** Acts 2007, No. 15, § 1.

#### **4-47-504. Interim distributions.**

A partner does not have a right to any distribution before the dissolution and winding up of the limited partnership unless the limited partnership decides to make an interim distribution.

**History.** Acts 2007, No. 15, § 1.

#### **4-47-505. No distribution on account of dissociation.**

A person does not have a right to receive a distribution on account of dissociation.

**History.** Acts 2007, No. 15, § 1.

#### **4-47-506. Distribution in kind.**

A partner does not have a right to demand or receive any distribution from a limited partnership in any form other than cash. Subject to § 4-47-812(b), a limited partnership may distribute an asset in kind to

the extent each partner receives a percentage of the asset equal to the partner's share of distributions.

**History.** Acts 2007, No. 15, § 1.

#### **4-47-507. Right to distribution.**

When a partner or transferee becomes entitled to receive a distribution, the partner or transferee has the status of, and is entitled to all remedies available to, a creditor of the limited partnership with respect to the distribution. However, the limited partnership's obligation to make a distribution is subject to offset for any amount owed to the limited partnership by the partner or dissociated partner on whose account the distribution is made.

**History.** Acts 2007, No. 15, § 1.

#### **4-47-508. Limitations on distribution.**

(a) A limited partnership may not make a distribution in violation of the partnership agreement.

(b) A limited partnership may not make a distribution if after the distribution:

(1) the limited partnership would not be able to pay its debts as they become due in the ordinary course of the limited partnership's activities; or

(2) the limited partnership's total assets would be less than the sum of its total liabilities plus the amount that would be needed, if the limited partnership were to be dissolved, wound up, and terminated at the time of the distribution, to satisfy the preferential rights upon dissolution, winding up, and termination of partners whose preferential rights are superior to those of persons receiving the distribution.

(c) A limited partnership may base a determination that a distribution is not prohibited under subsection (b) on financial statements prepared on the basis of accounting practices and principles that are reasonable in the circumstances or on a fair valuation or other method that is reasonable in the circumstances.

(d) Except as otherwise provided in subsection (g), the effect of a distribution under subsection (b) is measured:

(1) in the case of distribution by purchase, redemption, or other acquisition of a transferable interest in the limited partnership, as of the date money or other property is transferred or debt incurred by the limited partnership; and

(2) in all other cases, as of the date:

(A) the distribution is authorized, if the payment occurs within 120 days after that date; or

(B) the payment is made, if payment occurs more than 120 days after the distribution is authorized.

(e) A limited partnership's indebtedness to a partner incurred by reason of a distribution made in accordance with this section is at parity

with the limited partnership's indebtedness to its general, unsecured creditors.

(f) A limited partnership's indebtedness, including indebtedness issued in connection with or as part of a distribution, is not considered a liability for purposes of subsection (b) if the terms of the indebtedness provide that payment of principal and interest are made only to the extent that a distribution could then be made to partners under this section.

(g) If indebtedness is issued as a distribution, each payment of principal or interest on the indebtedness is treated as a distribution, the effect of which is measured on the date the payment is made.

**History.** Acts 2007, No. 15, § 1.

#### **4-47-509. Liability for improper distributions.**

(a) A general partner that consents to a distribution made in violation of § 4-47-508 is personally liable to the limited partnership for the amount of the distribution which exceeds the amount that could have been distributed without the violation if it is established that in consenting to the distribution the general partner failed to comply with § 4-47-408.

(b) A partner or transferee that received a distribution knowing that the distribution to that partner or transferee was made in violation of § 4-47-508 is personally liable to the limited partnership but only to the extent that the distribution received by the partner or transferee exceeded the amount that could have been properly paid under § 4-47-508.

(c) A general partner against which an action is commenced under subsection (a) may:

(1) implead in the action any other person that is liable under subsection (a) and compel contribution from the person; and

(2) implead in the action any person that received a distribution in violation of subsection (b) and compel contribution from the person in the amount the person received in violation of subsection (b).

(d) An action under this section is barred if it is not commenced within two years after the distribution.

**History.** Acts 2007, No. 15, § 1.

### **SUBCHAPTER 6 — DISSOCIATION**

#### **SECTION.**

4-47-601. Dissociation as limited partner.

4-47-602. Effect of dissociation as limited partner.

4-47-603. Dissociation as general partner.

4-47-604. Person's power to dissociate as general partner — Wrongful dissociation.

#### **SECTION.**

4-47-605. Effect of dissociation as general partner.

4-47-606. Power to bind and liability to limited partnership before dissolution of partnership of person dissociated as general partner.

4-47-607. Liability to other persons of

person dissociated as general partner.

#### **4-47-601. Dissociation as limited partner.**

(a) A person does not have a right to dissociate as a limited partner before the termination of the limited partnership.

(b) A person is dissociated from a limited partnership as a limited partner upon the occurrence of any of the following events:

(1) the limited partnership's having notice of the person's express will to withdraw as a limited partner or on a later date specified by the person;

(2) an event agreed to in the partnership agreement as causing the person's dissociation as a limited partner;

(3) the person's expulsion as a limited partner pursuant to the partnership agreement;

(4) the person's expulsion as a limited partner by the unanimous consent of the other partners if:

(A) it is unlawful to carry on the limited partnership's activities with the person as a limited partner;

(B) there has been a transfer of all of the person's transferable interest in the limited partnership, other than a transfer for security purposes, or a court order charging the person's interest, which has not been foreclosed;

(C) the person is a corporation and, within 90 days after the limited partnership notifies the person that it will be expelled as a limited partner because it has filed a certificate of dissolution or the equivalent, its charter has been revoked, or its right to conduct business has been suspended by the jurisdiction of its incorporation, there is no revocation of the certificate of dissolution or no reinstatement of its charter or its right to conduct business; or

(D) the person is a limited liability company or partnership that has been dissolved and whose business is being wound up;

(5) on application by the limited partnership, the person's expulsion as a limited partner by judicial order because:

(A) the person engaged in wrongful conduct that adversely and materially affected the limited partnership's activities;

(B) the person willfully or persistently committed a material breach of the partnership agreement or of the obligation of good faith and fair dealing under § 4-47-305(b); or

(C) the person engaged in conduct relating to the limited partnership's activities which makes it not reasonably practicable to carry on the activities with the person as limited partner;

(6) in the case of a person who is an individual, the person's death;

(7) in the case of a person that is a trust or is acting as a limited partner by virtue of being a trustee of a trust, distribution of the trust's entire transferable interest in the limited partnership, but not merely by reason of the substitution of a successor trustee;

(8) in the case of a person that is an estate or is acting as a limited partner by virtue of being a personal representative of an estate,

distribution of the estate's entire transferable interest in the limited partnership, but not merely by reason of the substitution of a successor personal representative;

(9) termination of a limited partner that is not an individual, partnership, limited liability company, corporation, trust, or estate;

(10) the limited partnership's participation in a conversion or merger under subchapter 11, if the limited partnership:

(A) is not the converted or surviving entity; or

(B) is the converted or surviving entity but, as a result of the conversion or merger, the person ceases to be a limited partner.

**History.** Acts 2007, No. 15, § 1.

#### **4-47-602. Effect of dissociation as limited partner.**

(a) Upon a person's dissociation as a limited partner:

(1) subject to § 4-47-704, the person does not have further rights as a limited partner;

(2) the person's obligation of good faith and fair dealing as a limited partner under § 4-47-305(b) continues only as to matters arising and events occurring before the dissociation; and

(3) subject to § 4-47-704 and subchapter 11, any transferable interest owned by the person in the person's capacity as a limited partner immediately before dissociation is owned by the person as a mere transferee.

(b) A person's dissociation as a limited partner does not of itself discharge the person from any obligation to the limited partnership or the other partners which the person incurred while a limited partner.

**History.** Acts 2007, No. 15, § 1.

#### **4-47-603. Dissociation as general partner.**

A person is dissociated from a limited partnership as a general partner upon the occurrence of any of the following events:

(1) the limited partnership's having notice of the person's express will to withdraw as a general partner or on a later date specified by the person;

(2) an event agreed to in the partnership agreement as causing the person's dissociation as a general partner;

(3) the person's expulsion as a general partner pursuant to the partnership agreement;

(4) the person's expulsion as a general partner by the unanimous consent of the other partners if:

(A) it is unlawful to carry on the limited partnership's activities with the person as a general partner;

(B) there has been a transfer of all or substantially all of the person's transferable interest in the limited partnership, other than a transfer for security purposes, or a court order charging the person's interest, which has not been foreclosed;

(C) the person is a corporation and, within 90 days after the limited partnership notifies the person that it will be expelled as a general partner because it has filed a certificate of dissolution or the equivalent, its charter has been revoked, or its right to conduct business has been suspended by the jurisdiction of its incorporation, there is no revocation of the certificate of dissolution or no reinstatement of its charter or its right to conduct business; or

(D) the person is a limited liability company or partnership that has been dissolved and whose business is being wound up;

(5) on application by the limited partnership, the person's expulsion as a general partner by judicial determination because:

(A) the person engaged in wrongful conduct that adversely and materially affected the limited partnership activities;

(B) the person willfully or persistently committed a material breach of the partnership agreement or of a duty owed to the partnership or the other partners under § 4-47-408; or

(C) the person engaged in conduct relating to the limited partnership's activities which makes it not reasonably practicable to carry on the activities of the limited partnership with the person as a general partner;

(6) the person's:

(A) becoming a debtor in bankruptcy;

(B) execution of an assignment for the benefit of creditors;

(C) seeking, consenting to, or acquiescing in the appointment of a trustee, receiver, or liquidator of the person or of all or substantially all of the person's property; or

(D) failure, within 90 days after the appointment, to have vacated or stayed the appointment of a trustee, receiver, or liquidator of the general partner or of all or substantially all of the person's property obtained without the person's consent or acquiescence, or failing within 90 days after the expiration of a stay to have the appointment vacated;

(7) in the case of a person who is an individual:

(A) the person's death;

(B) the appointment of a guardian or general conservator for the person; or

(C) a judicial determination that the person has otherwise become incapable of performing the person's duties as a general partner under the partnership agreement;

(8) in the case of a person that is a trust or is acting as a general partner by virtue of being a trustee of a trust, distribution of the trust's entire transferable interest in the limited partnership, but not merely by reason of the substitution of a successor trustee;

(9) in the case of a person that is an estate or is acting as a general partner by virtue of being a personal representative of an estate, distribution of the estate's entire transferable interest in the limited partnership, but not merely by reason of the substitution of a successor personal representative;

(10) termination of a general partner that is not an individual, partnership, limited liability company, corporation, trust, or estate; or  
(11) the limited partnership's participation in a conversion or merger under subchapter 11, if the limited partnership:

(A) is not the converted or surviving entity; or

(B) is the converted or surviving entity but, as a result of the conversion or merger, the person ceases to be a general partner.

**History.** Acts 2007, No. 15, § 1.

#### **4-47-604. Person's power to dissociate as general partner — Wrongful dissociation.**

(a) A person has the power to dissociate as a general partner at any time, rightfully or wrongfully, by express will pursuant to § 4-47-603(1).

(b) A person's dissociation as a general partner is wrongful only if:

(1) it is in breach of an express provision of the partnership agreement; or

(2) it occurs before the termination of the limited partnership, and:

(A) the person withdraws as a general partner by express will;

(B) the person is expelled as a general partner by judicial determination under § 4-47-603(5);

(C) the person is dissociated as a general partner by becoming a debtor in bankruptcy; or

(D) in the case of a person that is not an individual, trust other than a business trust, or estate, the person is expelled or otherwise dissociated as a general partner because it willfully dissolved or terminated.

(c) A person that wrongfully dissociates as a general partner is liable to the limited partnership and, subject to § 4-47-1001, to the other partners for damages caused by the dissociation. The liability is in addition to any other obligation of the general partner to the limited partnership or to the other partners.

**History.** Acts 2007, No. 15, § 1.

#### **4-47-605. Effect of dissociation as general partner.**

(a) Upon a person's dissociation as a general partner:

(1) the person's right to participate as a general partner in the management and conduct of the partnership's activities terminates;

(2) the person's duty of loyalty as a general partner under § 4-47-408(b)(3) terminates;

(3) the person's duty of loyalty as a general partner under § 4-47-408(b)(1) and (2) and duty of care under § 4-47-408(c) continue only with regard to matters arising and events occurring before the person's dissociation as a general partner;

(4) the person may sign and deliver to the Secretary of State for filing a statement of dissociation pertaining to the person and, at the request

of the limited partnership, shall sign an amendment to the certificate of limited partnership which states that the person has dissociated; and

(5) subject to § 4-47-704 and subchapter 11, any transferable interest owned by the person immediately before dissociation in the person's capacity as a general partner is owned by the person as a mere transferee.

(b) A person's dissociation as a general partner does not of itself discharge the person from any obligation to the limited partnership or the other partners which the person incurred while a general partner.

**History.** Acts 2007, No. 15, § 1.

**4-47-606. Power to bind and liability to limited partnership before dissolution of partnership of person dissociated as general partner.**

(a) After a person is dissociated as a general partner and before the limited partnership is dissolved, converted under subchapter 11, or merged out of existence under subchapter 11, the limited partnership is bound by an act of the person only if:

(1) the act would have bound the limited partnership under § 4-47-402 before the dissociation; and

(2) at the time the other party enters into the transaction:

(A) less than two years has passed since the dissociation; and

(B) the other party does not have notice of the dissociation and reasonably believes that the person is a general partner.

(b) If a limited partnership is bound under subsection (a), the person dissociated as a general partner which caused the limited partnership to be bound is liable:

(1) to the limited partnership for any damage caused to the limited partnership arising from the obligation incurred under subsection (a); and

(2) if a general partner or another person dissociated as a general partner is liable for the obligation, to the general partner or other person for any damage caused to the general partner or other person arising from the liability.

**History.** Acts 2007, No. 15, § 1.

**4-47-607. Liability to other persons of person dissociated as general partner.**

(a) A person's dissociation as a general partner does not of itself discharge the person's liability as a general partner for an obligation of the limited partnership incurred before dissociation. Except as otherwise provided in subsections (b) and (c), the person is not liable for a limited partnership's obligation incurred after dissociation.

(b) A person whose dissociation as a general partner resulted in a dissolution and winding up of the limited partnership's activities is

liable to the same extent as a general partner under § 4-47-404 on an obligation incurred by the limited partnership under § 4-47-804.

(c) A person that has dissociated as a general partner but whose dissociation did not result in a dissolution and winding up of the limited partnership's activities is liable on a transaction entered into by the limited partnership after the dissociation only if:

(1) a general partner would be liable on the transaction; and

(2) at the time the other party enters into the transaction:

(A) less than two years has passed since the dissociation; and

(B) the other party does not have notice of the dissociation and reasonably believes that the person is a general partner.

(d) By agreement with a creditor of a limited partnership and the limited partnership, a person dissociated as a general partner may be released from liability for an obligation of the limited partnership.

(e) A person dissociated as a general partner is released from liability for an obligation of the limited partnership if the limited partnership's creditor, with notice of the person's dissociation as a general partner but without the person's consent, agrees to a material alteration in the nature or time of payment of the obligation.

**History.** Acts 2007, No. 15, § 1.

## **SUBCHAPTER 7 — TRANSFERABLE INTERESTS AND RIGHTS OF TRANSFEREES AND CREDITORS**

### **SECTION.**

4-47-701. Partner's transferable interest.

4-47-702. Transfer of partner's transferable interest.

4-47-703. Rights of creditor of partner or transferee.

### **SECTION.**

4-47-704. Power of estate of deceased partner.

### **4-47-701. Partner's transferable interest.**

The only interest of a partner which is transferable is the partner's transferable interest. A transferable interest is personal property.

**History.** Acts 2007, No. 15, § 1.

### **4-47-702. Transfer of partner's transferable interest.**

(a) A transfer, in whole or in part, of a partner's transferable interest:

(1) is permissible;

(2) does not by itself cause the partner's dissociation or a dissolution and winding up of the limited partnership's activities; and

(3) does not, as against the other partners or the limited partnership, entitle the transferee to participate in the management or conduct of the limited partnership's activities, to require access to information concerning the limited partnership's transactions except as otherwise provided in subsection (c), or to inspect or copy the required information or the limited partnership's other records.

(b) A transferee has a right to receive, in accordance with the transfer:

(1) distributions to which the transferor would otherwise be entitled; and

(2) upon the dissolution and winding up of the limited partnership's activities the net amount otherwise distributable to the transferor.

(c) In a dissolution and winding up, a transferee is entitled to an account of the limited partnership's transactions only from the date of dissolution.

(d) Upon transfer, the transferor retains the rights of a partner other than the interest in distributions transferred and retains all duties and obligations of a partner.

(e) A limited partnership need not give effect to a transferee's rights under this section until the limited partnership has notice of the transfer.

(f) A transfer of a partner's transferable interest in the limited partnership in violation of a restriction on transfer contained in the partnership agreement is ineffective as to a person having notice of the restriction at the time of transfer.

(g) A transferee that becomes a partner with respect to a transferable interest is liable for the transferor's obligations under §§ 4-47-502 and 4-47-509. However, the transferee is not obligated for liabilities unknown to the transferee at the time the transferee became a partner.

**History.** Acts 2007, No. 15, § 1.

#### **4-47-703. Rights of creditor of partner or transferee.**

(a) On application to a court of competent jurisdiction by any judgment creditor of a partner or transferee, the court may charge the transferable interest of the judgment debtor with payment of the unsatisfied amount of the judgment with interest. To the extent so charged, the judgment creditor has only the rights of a transferee. The court may appoint a receiver of the share of the distributions due or to become due to the judgment debtor in respect of the partnership and make all other orders, directions, accounts, and inquiries the judgment debtor might have made or which the circumstances of the case may require to give effect to the charging order.

(b) A charging order constitutes a lien on the judgment debtor's transferable interest. The court may order a foreclosure upon the interest subject to the charging order at any time. The purchaser at the foreclosure sale has the rights of a transferee.

(c) At any time before foreclosure, an interest charged may be redeemed:

(1) by the judgment debtor;

(2) with property other than limited partnership property, by one or more of the other partners; or

(3) with limited partnership property, by the limited partnership with the consent of all partners whose interests are not so charged.

(d) This chapter does not deprive any partner or transferee of the benefit of any exemption laws applicable to the partner's or transferee's transferable interest.

(e) This section provides the exclusive remedy by which a judgment creditor of a partner or transferee may satisfy a judgment out of the judgment debtor's transferable interest.

**History.** Acts 2007, No. 15, § 1.

#### **4-47-704. Power of estate of deceased partner.**

If a partner dies, the deceased partner's personal representative or other legal representative may exercise the rights of a transferee as provided in § 4-47-702 and, for the purposes of settling the estate, may exercise the rights of a current limited partner under § 4-47-304.

**History.** Acts 2007, No. 15, § 1.

### **SUBCHAPTER 8 — DISSOLUTION**

#### **SECTION.**

- 4-47-801. Nonjudicial dissolution.
- 4-47-802. Judicial dissolution.
- 4-47-803. Winding up.
- 4-47-804. Power of general partner and person dissociated as general partner to bind partnership after dissolution.
- 4-47-805. Liability after dissolution of general partner and person dissociated as general partner to limited partnership, other general partners, and persons dissociated as general partner.
- 4-47-806. Known claims against dissolved limited partnership.

#### **SECTION.**

- 4-47-807. Other claims against dissolved limited partnership.
- 4-47-808. Liability of general partner and person dissociated as general partner when claim against limited partnership barred.
- 4-47-809. Administrative dissolution.
- 4-47-810. Reinstatement following administrative dissolution.
- 4-47-811. Appeal from denial of reinstatement.
- 4-47-812. Disposition of assets — When contributions required.

#### **4-47-801. Nonjudicial dissolution.**

Except as otherwise provided in § 4-47-802, a limited partnership is dissolved, and its activities must be wound up, only upon the occurrence of any of the following:

(1) the happening of an event specified in the partnership agreement;

(2) the consent of all general partners and of limited partners owning a majority of the rights to receive distributions as limited partners at the time the consent is to be effective;

(3) after the dissociation of a person as a general partner:

(A) if the limited partnership has at least one remaining general partner, the consent to dissolve the limited partnership given within 90 days after the dissociation by partners owning a majority of the

rights to receive distributions as partners at the time the consent is to be effective; or

(B) if the limited partnership does not have a remaining general partner, the passage of 90 days after the dissociation, unless before the end of the period:

(i) consent to continue the activities of the limited partnership and admit at least one general partner is given by limited partners owning a majority of the rights to receive distributions as limited partners at the time the consent is to be effective; and

(ii) at least one person is admitted as a general partner in accordance with the consent;

(4) the passage of 90 days after the dissociation of the limited partnership's last limited partner, unless before the end of the period the limited partnership admits at least one limited partner; or

(5) the signing and filing of a declaration of dissolution by the Secretary of State under § 4-47-809(c).

**History.** Acts 2007, No. 15, § 1.

#### **4-47-802. Judicial dissolution.**

On application by a partner the circuit court may order dissolution of a limited partnership if it is not reasonably practicable to carry on the activities of the limited partnership in conformity with the partnership agreement.

**History.** Acts 2007, No. 15, § 1.

#### **4-47-803. Winding up.**

(a) A limited partnership continues after dissolution only for the purpose of winding up its activities.

(b) In winding up its activities, the limited partnership:

(1) may amend its certificate of limited partnership to state that the limited partnership is dissolved, preserve the limited partnership business or property as a going concern for a reasonable time, prosecute and defend actions and proceedings, whether civil, criminal, or administrative, transfer the limited partnership's property, settle disputes by mediation or arbitration, file a statement of termination as provided in § 4-47-203, and perform other necessary acts; and

(2) shall discharge the limited partnership's liabilities, settle and close the limited partnership's activities, and marshal and distribute the assets of the partnership.

(c) If a dissolved limited partnership does not have a general partner, a person to wind up the dissolved limited partnership's activities may be appointed by the consent of limited partners owning a majority of the rights to receive distributions as limited partners at the time the consent is to be effective. A person appointed under this subsection:

(1) has the powers of a general partner under § 4-47-804; and

(2) shall promptly amend the certificate of limited partnership to state:

- (A) that the limited partnership does not have a general partner;
- (B) the name of the person that has been appointed to wind up the limited partnership; and
- (C) the street and mailing address of the person.

(d) On the application of any partner, the circuit court may order judicial supervision of the winding up, including the appointment of a person to wind up the dissolved limited partnership's activities, if:

- (1) a limited partnership does not have a general partner and within a reasonable time following the dissolution no person has been appointed pursuant to subsection (c); or
- (2) the applicant establishes other good cause.

**History.** Acts 2007, No. 15, § 1.

**4-47-804. Power of general partner and person dissociated as general partner to bind partnership after dissolution.**

(a) A limited partnership is bound by a general partner's act after dissolution which:

(1) is appropriate for winding up the limited partnership's activities; or

(2) would have bound the limited partnership under § 4-47-402 before dissolution, if, at the time the other party enters into the transaction, the other party does not have notice of the dissolution.

(b) A person dissociated as a general partner binds a limited partnership through an act occurring after dissolution if:

(1) at the time the other party enters into the transaction:

- (A) less than two years has passed since the dissociation; and
- (B) the other party does not have notice of the dissociation and reasonably believes that the person is a general partner; and

(2) the act:

(A) is appropriate for winding up the limited partnership's activities; or

(B) would have bound the limited partnership under § 4-47-402 before dissolution and at the time the other party enters into the transaction the other party does not have notice of the dissolution.

**History.** Acts 2007, No. 15, § 1.

**4-47-805. Liability after dissolution of general partner and person dissociated as general partner to limited partnership, other general partners, and persons dissociated as general partner.**

(a) If a general partner having knowledge of the dissolution causes a limited partnership to incur an obligation under § 4-47-804(a) by an act

that is not appropriate for winding up the partnership's activities, the general partner is liable:

(1) to the limited partnership for any damage caused to the limited partnership arising from the obligation; and

(2) if another general partner or a person dissociated as a general partner is liable for the obligation, to that other general partner or person for any damage caused to that other general partner or person arising from the liability.

(b) If a person dissociated as a general partner causes a limited partnership to incur an obligation under § 4-47-804(b), the person is liable:

(1) to the limited partnership for any damage caused to the limited partnership arising from the obligation; and

(2) if a general partner or another person dissociated as a general partner is liable for the obligation, to the general partner or other person for any damage caused to the general partner or other person arising from the liability.

**History.** Acts 2007, No. 15, § 1.

#### **4-47-806. Known claims against dissolved limited partnership.**

(a) A dissolved limited partnership may dispose of the known claims against it by following the procedure described in subsection (b).

(b) A dissolved limited partnership may notify its known claimants of the dissolution in a record. The notice must:

- (1) specify the information required to be included in a claim;
- (2) provide a mailing address to which the claim is to be sent;
- (3) state the deadline for receipt of the claim, which may not be less than 120 days after the date the notice is received by the claimant;
- (4) state that the claim will be barred if not received by the deadline; and

(5) unless the limited partnership has been throughout its existence a limited liability limited partnership, state that the barring of a claim against the limited partnership will also bar any corresponding claim against any general partner or person dissociated as a general partner which is based on § 4-47-404.

(c) A claim against a dissolved limited partnership is barred if the requirements of subsection (b) are met and:

- (1) the claim is not received by the specified deadline; or
- (2) in the case of a claim that is timely received but rejected by the dissolved limited partnership, the claimant does not commence an action to enforce the claim against the limited partnership within 90 days after the receipt of the notice of the rejection.

(d) This section does not apply to a claim based on an event occurring after the effective date of dissolution or a liability that is contingent on that date.

**History.** Acts 2007, No. 15, § 1.

**4-47-807. Other claims against dissolved limited partnership.**

(a) A dissolved limited partnership may publish notice of its dissolution and request persons having claims against the limited partnership to present them in accordance with the notice.

(b) The notice must:

(1) be published at least once in a newspaper of general circulation in the county in which the dissolved limited partnership's designated office is located or, if it has none in this State, in the county in which the limited partnership's designated office is or was last located;

(2) describe the information required to be contained in a claim and provide a mailing address to which the claim is to be sent;

(3) state that a claim against the limited partnership is barred unless an action to enforce the claim is commenced within five years after publication of the notice; and

(4) unless the limited partnership has been throughout its existence a limited liability limited partnership, state that the barring of a claim against the limited partnership will also bar any corresponding claim against any general partner or person dissociated as a general partner which is based on § 4-47-404.

(c) If a dissolved limited partnership publishes a notice in accordance with subsection (b), the claim of each of the following claimants is barred unless the claimant commences an action to enforce the claim against the dissolved limited partnership within five years after the publication date of the notice:

(1) a claimant that did not receive notice in a record under § 4-47-806;

(2) a claimant whose claim was timely sent to the dissolved limited partnership but not acted on; and

(3) a claimant whose claim is contingent or based on an event occurring after the effective date of dissolution.

(d) A claim not barred under this section may be enforced:

(1) against the dissolved limited partnership, to the extent of its undistributed assets;

(2) if the assets have been distributed in liquidation, against a partner or transferee to the extent of that person's proportionate share of the claim or the limited partnership's assets distributed to the partner or transferee in liquidation, whichever is less, but a person's total liability for all claims under this paragraph does not exceed the total amount of assets distributed to the person as part of the winding up of the dissolved limited partnership; or

(3) against any person liable on the claim under § 4-47-404.

**History.** Acts 2007, No. 15, § 1; 2009, No. 814, § 13. substituted "designated office" for "principal office" in (b)(1).

**Amendments.** The 2009 amendment

**4-47-808. Liability of general partner and person dissociated as general partner when claim against limited partnership barred.**

If a claim against a dissolved limited partnership is barred under § 4-47-806 or § 4-47-807, any corresponding claim under § 4-47-404 is also barred.

**History.** Acts 2007, No. 15, § 1.

**4-47-809. Administrative dissolution.**

(a) The Secretary of State may dissolve a limited partnership administratively if the limited partnership does not, within 60 days after the due date:

(1) pay any fee, tax, or penalty due to the Secretary of State under this chapter or other law; or

(2) deliver its annual report to the Secretary of State.

(b) If the Secretary of State determines that a ground exists for administratively dissolving a limited partnership, the Secretary of State shall file a record of the determination and serve the limited partnership with a copy of the filed record.

(c) If within 60 days after service of the copy the limited partnership does not correct each ground for dissolution or demonstrate to the reasonable satisfaction of the Secretary of State that each ground determined by the Secretary of State does not exist, the Secretary of State shall administratively dissolve the limited partnership by preparing, signing and filing a declaration of dissolution that states the grounds for dissolution. The Secretary of State shall serve the limited partnership with a copy of the filed declaration.

(d) A limited partnership administratively dissolved continues its existence but may carry on only activities necessary to wind up its activities and liquidate its assets under §§ 4-47-803 and 4-47-812 and to notify claimants under §§ 4-47-806 and 4-47-807.

(e) The administrative dissolution of a limited partnership does not terminate the authority of its agent for service of process.

**History.** Acts 2007, No. 15, § 1.

**4-47-810. Reinstatement following administrative dissolution.**

(a) A limited partnership that has been administratively dissolved may apply to the Secretary of State for reinstatement within two years after the effective date of dissolution. The application must be delivered to the Secretary of State for filing and state:

(1) the name of the limited partnership and the effective date of its administrative dissolution;

(2) that the grounds for dissolution either did not exist or have been eliminated; and

(3) that the limited partnership's name satisfies the requirements of § 4-47-108.

(b) If the Secretary of State determines that an application contains the information required by subsection (a) and that the information is correct, the Secretary of State shall prepare a declaration of reinstatement that states this determination, sign, and file the original of the declaration of reinstatement, and serve the limited partnership with a copy.

(c) When reinstatement becomes effective, it relates back to and takes effect as of the effective date of the administrative dissolution and the limited partnership may resume its activities as if the administrative dissolution had never occurred.

**History.** Acts 2007, No. 15, § 1.

#### **4-47-811. Appeal from denial of reinstatement.**

(a) If the Secretary of State denies a limited partnership's application for reinstatement following administrative dissolution, the Secretary of State shall prepare, sign and file a notice that explains the reason or reasons for denial and serve the limited partnership with a copy of the notice.

(b) Within 30 days after service of the notice of denial, the limited partnership may appeal from the denial of reinstatement by petitioning the circuit court to set aside the dissolution. The petition must be served on the Secretary of State and contain a copy of the Secretary of State's declaration of dissolution, the limited partnership's application for reinstatement, and the Secretary of State's notice of denial.

(c) The court may summarily order the Secretary of State to reinstate the dissolved limited partnership or may take other action the court considers appropriate.

**History.** Acts 2007, No. 15, § 1.

#### **4-47-812. Disposition of assets — When contributions required.**

(a) In winding up a limited partnership's activities, the assets of the limited partnership, including the contributions required by this section, must be applied to satisfy the limited partnership's obligations to creditors, including, to the extent permitted by law, partners that are creditors.

(b) Any surplus remaining after the limited partnership complies with subsection (a) must be paid in cash as a distribution.

(c) If a limited partnership's assets are insufficient to satisfy all of its obligations under subsection (a), with respect to each unsatisfied obligation incurred when the limited partnership was not a limited liability limited partnership, the following rules apply:

(1) Each person that was a general partner when the obligation was incurred and that has not been released from the obligation under § 4-47-607 shall contribute to the limited partnership for the purpose of

enabling the limited partnership to satisfy the obligation. The contribution due from each of those persons is in proportion to the right to receive distributions in the capacity of general partner in effect for each of those persons when the obligation was incurred.

(2) If a person does not contribute the full amount required under subdivision (c)(1) with respect to an unsatisfied obligation of the limited partnership, the other persons required to contribute by subdivision (c)(1) on account of the obligation shall contribute the additional amount necessary to discharge the obligation. The additional contribution due from each of those other persons is in proportion to the right to receive distributions in the capacity of general partner in effect for each of those other persons when the obligation was incurred.

(3) If a person does not make the additional contribution required by subdivision (c)(2), further additional contributions are determined and due in the same manner as provided in that paragraph.

(d) A person that makes an additional contribution under subsection (c)(2) or (3) may recover from any person whose failure to contribute under subsection (c)(1) or (2) necessitated the additional contribution. A person may not recover under this subsection more than the amount additionally contributed. A person's liability under this subsection may not exceed the amount the person failed to contribute.

(e) The estate of a deceased individual is liable for the person's obligations under this section.

(f) An assignee for the benefit of creditors of a limited partnership or a partner, or a person appointed by a court to represent creditors of a limited partnership or a partner, may enforce a person's obligation to contribute under subsection (c).

**History.** Acts 2007, No. 15, § 1.

## SUBCHAPTER 9 — FOREIGN LIMITED PARTNERSHIPS

### SECTION.

4-47-901. Governing law.

4-47-902. Application for certificate of authority.

4-47-903. Activities not constituting transacting business.

4-47-904. Filing of certificate of authority.

4-47-905. Noncomplying name of foreign limited partnership.

### SECTION.

4-47-906. Revocation of certificate of authority.

4-47-907. Cancellation of certificate of authority — Effect of failure to have certificate.

4-47-908. Action by Secretary of State.

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**Effective Dates.** Acts 2007, No. 638,  
§ 70: Sept. 1, 2007.

**4-47-901. Governing law.**

(a) The laws of the State or other jurisdiction under which a foreign limited partnership is organized govern relations among the partners of the foreign limited partnership and between the partners and the foreign limited partnership and the liability of partners as partners for an obligation of the foreign limited partnership.

(b) A foreign limited partnership may not be denied a certificate of authority by reason of any difference between the laws of the jurisdiction under which the foreign limited partnership is organized and the laws of this State.

(c) A certificate of authority does not authorize a foreign limited partnership to engage in any business or exercise any power that a limited partnership may not engage in or exercise in this State.

**History.** Acts 2007, No. 15, § 1.

**4-47-902. Application for certificate of authority.**

(a) Before transacting business in this State, a foreign limited partnership shall apply for a certificate of authority to transact business in this State by delivering an application to the Secretary of State for filing. The application must state:

(1) the name of the foreign limited partnership and, if the name does not comply with § 4-47-108, an alternate name adopted pursuant to § 4-47-905(a);

(2) the name of the State or other jurisdiction under whose law the foreign limited partnership is organized;

(3) the street and mailing address of the foreign limited partnership's principal office and, if the laws of the jurisdiction under which the foreign limited partnership is organized require the foreign limited partnership to maintain an office in that jurisdiction, the street and mailing address of the required office;

(4) the information required by § 4-20-105(a) concerning the foreign limited partnership's initial agent for service of process in this State;

(5) the name and street and mailing address of each of the foreign limited partnership's general partners; and

(6) whether the foreign limited partnership is a foreign limited liability limited partnership.

(b) A foreign limited partnership shall deliver with the completed application a certificate of existence or a record of similar import signed by the Secretary of State or other official having custody of the foreign limited partnership's publicly filed records in the State or other jurisdiction under whose law the foreign limited partnership is organized.

**History.** Acts 2007, No. 15, § 1; 2009, No. 814, § 14.

**Amendments.** The 2009 amendment,

in (a), inserted "Before transacting business in this State" and substituted "shall" for "may" in the introductory language,

and substituted "information required by § 4-20-105(a) concerning" for "name and street and mailing address of" in (a)(4).

#### **4-47-903. Activities not constituting transacting business.**

(a) Activities of a foreign limited partnership which do not constitute transacting business in this State within the meaning of this chapter include:

- (1) maintaining, defending, and settling an action or proceeding;
- (2) holding meetings of its partners or carrying on any other activity concerning its internal affairs;
- (3) maintaining accounts in financial institutions;
- (4) maintaining offices or agencies for the transfer, exchange, and registration of the foreign limited partnership's own securities or maintaining trustees or depositories with respect to those securities;
- (5) selling through independent contractors;
- (6) soliciting or obtaining orders, whether by mail or electronic means or through employees or agents or otherwise, if the orders require acceptance outside this State before they become contracts;
- (7) creating or acquiring indebtedness, mortgages, or security interests in real or personal property;
- (8) securing or collecting debts or enforcing mortgages or other security interests in property securing the debts, and holding, protecting, and maintaining property so acquired;
- (9) conducting an isolated transaction that is completed within 30 days and is not one in the course of similar transactions of a like manner; and
- (10) transacting business in interstate commerce.

(b) For purposes of this chapter, the ownership in this State of income-producing real property or tangible personal property, other than property excluded under subsection (a), constitutes transacting business in this State.

(c) This section does not apply in determining the contacts or activities that may subject a foreign limited partnership to service of process, taxation, or regulation under any other law of this State.

**History.** Acts 2007, No. 15, § 1.

#### **4-47-904. Filing of certificate of authority.**

Unless the Secretary of State determines that an application for a certificate of authority does not comply with the filing requirements of this chapter, the Secretary of State, upon payment of all filing fees, shall file the application, prepare, sign and file a certificate of authority to transact business in this State, and send a copy of the filed certificate, together with a receipt for the fees, to the foreign limited partnership or its representative.

**History.** Acts 2007, No. 15, § 1.

**4-47-905. Noncomplying name of foreign limited partnership.**

(a) A foreign limited partnership whose name does not comply with § 4-47-108 may not obtain a certificate of authority until it adopts, for the purpose of transacting business in this State, an alternate name that complies with § 4-47-108. A foreign limited partnership that adopts an alternate name under this subsection and then obtains a certificate of authority with the name need not comply with § 4-32-108. After obtaining a certificate of authority with an alternate name, a foreign limited partnership shall transact business in this State under the name unless the foreign limited partnership is authorized under § 4-32-108 to transact business in this State under another name.

(b) If a foreign limited partnership authorized to transact business in this State changes its name to one that does not comply with § 4-47-108, it may not thereafter transact business in this State until it complies with subsection (a) and obtains an amended certificate of authority.

**History.** Acts 2007, No. 15, § 1.

**4-47-906. Revocation of certificate of authority.**

(a) A certificate of authority of a foreign limited partnership to transact business in this State may be revoked by the Secretary of State in the manner provided in subsections (b) and (c) if the foreign limited partnership does not:

(1) pay, within 60 days after the due date, any fee, tax or penalty due to the Secretary of State under this chapter or other law;

(2) deliver, within 60 days after the due date, its annual report required under § 4-47-210;

(3) appoint and maintain an agent for service of process under the Model Registered Agents Act, § 4-20-101 et seq.; or

(4) deliver for filing a statement of a change under § 4-20-108 within 30 days after a change has occurred in the name or address of the agent.

(b) In order to revoke a certificate of authority, the Secretary of State must prepare, sign, and file a notice of revocation and send a copy to the foreign limited partnership's agent for service of process in this State, or if the foreign limited partnership does not appoint and maintain a proper agent in this State, to the foreign limited partnership's principal office. The notice must state:

(1) the revocation's effective date, which must be at least 60 days after the date the Secretary of State sends the copy; and

(2) the foreign limited partnership's failures to comply with subsection (a) which are the reason for the revocation.

(c) The authority of the foreign limited partnership to transact business in this State ceases on the effective date of the notice of revocation unless before that date the foreign limited partnership cures each failure to comply with subsection (a) stated in the notice. If the foreign limited partnership cures the failures, the Secretary of State shall so indicate on the filed notice.

**History.** Acts 2007, No. 15, § 1; 2007, No. 638, § 64; 2009, No. 814, § 15.

**Amendments.** The 2007 amendment by No. 638, in (a), substituted “4-20-108” for “4-47-114” in (3) and for “4-47-115” in (4); substituted “principal office” for “designated office” in (b); and made a minor stylistic change.

The 2009 amendment substituted “under the Model Registered Agents Act, § 4-20-101 et seq.” for “as required by § 4-20-108” in (a)(3).

**Effective Dates.** Acts 2007, No. 638, § 70, provided: “Effective date. This act takes effect September 1, 2007.”

#### **4-47-907. Cancellation of certificate of authority — Effect of failure to have certificate.**

(a) In order to cancel its certificate of authority to transact business in this State, a foreign limited partnership must deliver to the Secretary of State for filing a notice of cancellation. The certificate is canceled when the notice becomes effective under § 4-47-206.

(b) A foreign limited partnership transacting business in this State may not maintain an action or proceeding in this State unless it has a certificate of authority to transact business in this State.

(c) The failure of a foreign limited partnership to have a certificate of authority to transact business in this State does not impair the validity of a contract or act of the foreign limited partnership or prevent the foreign limited partnership from defending an action or proceeding in this State.

(d) A partner of a foreign limited partnership is not liable for the obligations of the foreign limited partnership solely by reason of the foreign limited partnership’s having transacted business in this State without a certificate of authority.

(e) If a foreign limited partnership transacts business in this State without a certificate of authority or cancels its certificate of authority, it appoints the Secretary of State as its agent for service of process for rights of action arising out of the transaction of business in this State.

**History.** Acts 2007, No. 15, § 1.

#### **4-47-908. Action by Secretary of State.**

The Secretary of State may maintain an action to restrain a foreign limited partnership from transacting business in this State in violation of this chapter.

**History.** Acts 2007, No. 15, § 1.

### **SUBCHAPTER 10 — ACTIONS BY PARTNERS**

#### **SECTION.**

4-47-1001. Direct action by partner.

4-47-1002. Derivative action.

4-47-1003. Proper plaintiff.

#### **SECTION.**

4-47-1004. Pleading.

4-47-1005. Proceeds and expenses.

**4-47-1001. Direct action by partner.**

(a) Subject to subsection (b), a partner may maintain a direct action against the limited partnership or another partner for legal or equitable relief, with or without an accounting as to the partnership's activities, to enforce the rights and otherwise protect the interests of the partner, including rights and interests under the partnership agreement or this chapter or arising independently of the partnership relationship.

(b) A partner commencing a direct action under this section is required to plead and prove an actual or threatened injury that is not solely the result of an injury suffered or threatened to be suffered by the limited partnership.

(c) The accrual of, and any time limitation on, a right of action for a remedy under this section is governed by other law. A right to an accounting upon a dissolution and winding up does not revive a claim barred by law.

**History.** Acts 2007, No. 15, § 1.

**4-47-1002. Derivative action.**

A partner may maintain a derivative action to enforce a right of a limited partnership if:

(1) the partner first makes a demand on the general partners, requesting that they cause the limited partnership to bring an action to enforce the right, and the general partners do not bring the action within a reasonable time; or

(2) a demand would be futile.

**History.** Acts 2007, No. 15, § 1.

**4-47-1003. Proper plaintiff.**

A derivative action may be maintained only by a person that is a partner at the time the action is commenced and:

(1) that was a partner when the conduct giving rise to the action occurred; or

(2) whose status as a partner devolved upon the person by operation of law or pursuant to the terms of the partnership agreement from a person that was a partner at the time of the conduct.

**History.** Acts 2007, No. 15, § 1.

**4-47-1004. Pleading.**

In a derivative action, the complaint must state with particularity:

(1) the date and content of plaintiff's demand and the general partners' response to the demand; or

(2) why demand should be excused as futile.

**History.** Acts 2007, No. 15, § 1.

**4-47-1005. Proceeds and expenses.**

(a) Except as otherwise provided in subsection (b):

(1) any proceeds or other benefits of a derivative action, whether by judgment, compromise, or settlement, belong to the limited partnership and not to the derivative plaintiff;

(2) if the derivative plaintiff receives any proceeds, the derivative plaintiff shall immediately remit them to the limited partnership.

(b) If a derivative action is successful in whole or in part, the court may award the plaintiff reasonable expenses, including reasonable attorney's fees, from the recovery of the limited partnership.

**History.** Acts 2007, No. 15, § 1.

**SUBCHAPTER 11 — CONVERSION AND MERGER****SECTION.**

4-47-1101. Definitions.

4-47-1102. Conversion.

4-47-1103. Action on plan of conversion by converting limited partnership.

4-47-1104. Filings required for conversion — Effective date.

4-47-1105. Effect of conversion.

4-47-1106. Merger.

4-47-1107. Action on plan of merger by constituent limited partnership.

4-47-1108. Filings required for merger — Effective date.

**SECTION.**

4-47-1109. Effect of merger.

4-47-1110. Restrictions on approval of conversions and mergers and on relinquishing limited liability limited partnership status.

4-47-1111. Liability of general partner after conversion or merger.

4-47-1112. Power of general partners and persons dissociated as general partners to bind organization after conversion or merger.

4-47-1113. Chapter not exclusive.

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**Effective Dates.** Acts 2007, No. 638, § 70, Sept. 1, 2007.

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**4-47-1101. Definitions.**

In this subchapter:

(1) "Constituent limited partnership" means a constituent organization that is a limited partnership.

(2) "Constituent organization" means an organization that is party to a merger.

(3) "Converted organization" means the organization into which a converting organization converts pursuant to §§ 4-47-1102 through 4-47-1105.

(4) "Converting limited partnership" means a converting organization that is a limited partnership.

(5) "Converting organization" means an organization that converts into another organization pursuant to § 4-47-1102.

(6) "General partner" means a general partner of a limited partnership.

(7) "Governing statute" of an organization means the statute that governs the organization's internal affairs.

(8) "Organization" means a general partnership, including a limited liability partnership; limited partnership, including a limited liability limited partnership; limited liability company; business trust; corporation; or any other person having a governing statute. The term includes domestic and foreign organizations whether or not organized for profit.

(9) "Organizational documents" means:

(A) for a domestic or foreign general partnership, its partnership agreement;

(B) for a limited partnership or foreign limited partnership, its certificate of limited partnership and partnership agreement;

(C) for a domestic or foreign limited liability company, its articles of organization and operating agreement, or comparable records as provided in its governing statute;

(D) for a business trust, its agreement of trust and declaration of trust;

(E) for a domestic or foreign corporation for profit, its articles of incorporation, bylaws, and other agreements among its shareholders which are authorized by its governing statute, or comparable records as provided in its governing statute; and

(F) for any other organization, the basic records that create the organization and determine its internal governance and the relations among the persons that own it, have an interest in it, or are members of it.

(10) "Personal liability" means personal liability for a debt, liability, or other obligation of an organization which is imposed on a person that co-owns, has an interest in, or is a member of the organization:

(A) by the organization's governing statute solely by reason of the person co-owning, having an interest in, or being a member of the organization; or

(B) by the organization's organizational documents under a provision of the organization's governing statute authorizing those documents to make one or more specified persons liable for all or specified debts, liabilities, and other obligations of the organization solely by reason of the person or persons co-owning, having an interest in, or being a member of the organization.

(11) "Surviving organization" means an organization into which one or more other organizations are merged. A surviving organization may preexist the merger or be created by the merger.

**4-47-1102. Conversion.**

(a) An organization other than a limited partnership may convert to a limited partnership, and a limited partnership may convert to another organization pursuant to this section and §§ 4-47-1103 through 4-47-1105 and a plan of conversion, if:

(1) the other organization's governing statute authorizes the conversion;

(2) the conversion is not prohibited by the law of the jurisdiction that enacted the governing statute; and

(3) the other organization complies with its governing statute in effecting the conversion.

(b) A plan of conversion must be in a record and must include:

(1) the name and form of the organization before conversion;

(2) the name and form of the organization after conversion; and

(3) the terms and conditions of the conversion, including the manner and basis for converting interests in the converting organization into any combination of money, interests in the converted organization, and other consideration; and

(4) the organizational documents of the converted organization.

**History.** Acts 2007, No. 15, § 1.

**4-47-1103. Action on plan of conversion by converting limited partnership.**

(a) Subject to § 4-47-1110, a plan of conversion must be consented to by all the partners of a converting limited partnership.

(b) Subject to § 4-47-1110 and any contractual rights, after a conversion is approved, and at any time before a filing is made under § 4-47-1104, a converting limited partnership may amend the plan or abandon the planned conversion:

(1) as provided in the plan; and

(2) except as prohibited by the plan, by the same consent as was required to approve the plan.

**History.** Acts 2007, No. 15, § 1.

**4-47-1104. Filings required for conversion — Effective date.**

(a) After a plan of conversion is approved:

(1) a converting limited partnership shall deliver to the Secretary of State for filing articles of conversion, which must include:

(A) a statement that the limited partnership has been converted into another organization;

(B) the name and form of the organization and the jurisdiction of its governing statute;

(C) the date the conversion is effective under the governing statute of the converted organization;

(D) a statement that the conversion was approved as required by this chapter;

(E) a statement that the conversion was approved as required by the governing statute of the converted organization; and

(F) a statement confirming that the converted organization has filed a statement appointing an agent for service of process under § 4-20-112 if the converted organization is a foreign organization not authorized to transact business in this State, the street and mailing address of an office which may be used for service of process under § 4-47-1105(c); and

(2) if the converting organization is not a converting limited partnership, the converting organization shall deliver to the Secretary of State for filing a certificate of limited partnership, which must include, in addition to the information required by § 4-47-201:

(A) a statement that the limited partnership was converted from another organization;

(B) the name and form of the organization and the jurisdiction of its governing statute; and

(C) a statement that the conversion was approved in a manner that complied with the organization's governing statute.

(b) A conversion becomes effective:

(1) if the converted organization is a limited partnership, when the certificate of limited partnership takes effect; and

(2) if the converted organization is not a limited partnership, as provided by the governing statute of the converted organization.

**History.** Acts 2007, No. 15, § 1; 2007, No. 638, § 65; 2009, No. 814, § 16.

**Amendments.** The 2007 amendment by No. 638 substituted "may be used for service of process under" for "the Secretary of State may use for the purposes of" in (a)(1)(F).

The 2009 amendment inserted "a statement confirming that the converted orga-

nization has filed a statement appointing an agent for service of process under § 4-20-112" in (a)(1)(F).

**Effective Dates.** Acts 2007, No. 638, § 70: Effective date clause provided: "Effective date. This act takes effect September 1, 2007."

#### **4-47-1105. Effect of conversion.**

(a) An organization that has been converted pursuant to this subchapter is for all purposes the same entity that existed before the conversion.

(b) When a conversion takes effect:

(1) all property owned by the converting organization remains vested in the converted organization;

(2) all debts, liabilities, and other obligations of the converting organization continue as obligations of the converted organization;

(3) an action or proceeding pending by or against the converting organization may be continued as if the conversion had not occurred;

(4) except as prohibited by other law, all of the rights, privileges, immunities, powers, and purposes of the converting organization remain vested in the converted organization;

(5) except as otherwise provided in the plan of conversion, the terms and conditions of the plan of conversion take effect; and

(6) except as otherwise agreed, the conversion does not dissolve a converting limited partnership for the purposes of subchapter 8.

(c) A converted organization that is a foreign organization consents to the jurisdiction of the courts of this State to enforce any obligation owed by the converting limited partnership, if before the conversion the converting limited partnership was subject to suit in this State on the obligation. A converted organization that is a foreign organization and not authorized to transact business in this State may be served with process under § 4-20-113 if the converted organization:

(1) fails to appoint an agent for service of process under § 4-20-112;

(2) no longer has an agent for service of process; or

(3) has an agent for service of process that cannot with reasonable diligence be served.

**History.** Acts 2007, No. 15, § 1; 2007, No. 638, § 66; 2009, No. 814, § 17.

**Amendments.** The 2007 amendment by No. 638 substituted “may be served with process at the address required in the articles of conversion under § 4-47-1104(a)(1)(F)” for “appoints the Secretary of State as its agent for service of process for purposes of enforcing an obligation under this subsection. Service on the Secretary of State under\* this subsection is made in the same manner and with the same consequences as in § 4-47-117(c) and (d)” in (c).

The 2009 amendment, in (c), substituted “under § 4-20-113 if the converted organization” for “at the address required in the articles of conversion under § 4-47-1104(a)(1)(F)” in the introductory language, added (c)(1) through (c)(3), and made a related change.

**Effective Dates.** Acts 2007, No. 638, § 70: Effective date clause provided: “Effective date. This act takes effect September 1, 2007.”

#### 4-47-1106. Merger.

(a) A limited partnership may merge with one or more other constituent organizations pursuant to this section and §§ 4-47-1107 through 4-47-1109 and a plan of merger, if:

(1) the governing statute of each of the other organizations authorizes the merger;

(2) the merger is not prohibited by the law of a jurisdiction that enacted any of those governing statutes; and

(3) each of the other organizations complies with its governing statute in effecting the merger.

(b) A plan of merger must be in a record and must include:

(1) the name and form of each constituent organization;

(2) the name and form of the surviving organization and, if the surviving organization is to be created by the merger, a statement to that effect;

(3) the terms and conditions of the merger, including the manner and basis for converting the interests in each constituent organization into any combination of money, interests in the surviving organization, and other consideration;

(4) if the surviving organization is to be created by the merger, the surviving organization's organizational documents; and

(5) if the surviving organization is not to be created by the merger, any amendments to be made by the merger to the surviving organization's organizational documents.

**History.** Acts 2007, No. 15, § 1.

#### **4-47-1107. Action on plan of merger by constituent limited partnership.**

(a) Subject to § 4-47-1110, a plan of merger must be consented to by all the partners of a constituent limited partnership.

(b) Subject to § 4-47-1110 and any contractual rights, after a merger is approved, and at any time before a filing is made under § 4-47-1108, a constituent limited partnership may amend the plan or abandon the planned merger:

(1) as provided in the plan; and

(2) except as prohibited by the plan, with the same consent as was required to approve the plan.

**History.** Acts 2007, No. 15, § 1.

#### **4-47-1108. Filings required for merger — Effective date.**

(a) After each constituent organization has approved a merger, articles of merger must be signed on behalf of:

(1) each preexisting constituent limited partnership, by each general partner listed in the certificate of limited partnership; and

(2) each other preexisting constituent organization, by an authorized representative.

(b) The articles of merger must include:

(1) the name and form of each constituent organization and the jurisdiction of its governing statute;

(2) the name and form of the surviving organization, the jurisdiction of its governing statute, and, if the surviving organization is created by the merger, a statement to that effect;

(3) the date the merger is effective under the governing statute of the surviving organization;

(4) if the surviving organization is to be created by the merger:

(A) if it will be a limited partnership, the limited partnership's certificate of limited partnership; or

(B) if it will be an organization other than a limited partnership, the organizational document that creates the organization;

(5) if the surviving organization preexists the merger, any amendments provided for in the plan of merger for the organizational document that created the organization;

(6) a statement as to each constituent organization that the merger was approved as required by the organization's governing statute;

(7) a statement confirming that the surviving organization has filed a statement appointing an agent for service of process under § 4-20-112 if the surviving organization is a foreign organization not authorized to transact business in this State; and

(8) any additional information required by the governing statute of any constituent organization.

(c) Each constituent limited partnership shall deliver the articles of merger for filing in the office of the Secretary of State.

(d) A merger becomes effective under this subchapter:

(1) if the surviving organization is a limited partnership, upon the later of:

(A) compliance with subsection (c); or

(B) subject to § 4-47-206(c), as specified in the articles of merger;

(2) if the surviving organization is not a limited partnership, as provided by the governing statute of the surviving organization.

**History.** Acts 2007, No. 15, § 1; 2007, No. 638, § 67; 2009, No. 814, § 18.

**Amendments.** The 2007 amendment by No. 638 substituted "may be used for service of process under" for "the Secretary of State may use for the purposes of" in (b)(7).

The 2009 amendment, in (7), inserted "a statement confirming that the surviving organization has filed a statement ap-

pointing an agent for service of process under § 4-20-112," deleted "the street and mailing address of an office which may be used for service of process under § 4-47-1109(b)" following "this State," and made a related change.

**Effective Dates.** Acts 2007, No. 638, § 70: Effective date clause provided: "Effective date. This act takes effect September 1, 2007."

#### **4-47-1109. Effect of merger.**

(a) When a merger becomes effective:

(1) the surviving organization continues or comes into existence;

(2) each constituent organization that merges into the surviving organization ceases to exist as a separate entity;

(3) all property owned by each constituent organization that ceases to exist vests in the surviving organization;

(4) all debts, liabilities, and other obligations of each constituent organization that ceases to exist continue as obligations of the surviving organization;

(5) an action or proceeding pending by or against any constituent organization that ceases to exist may be continued as if the merger had not occurred;

(6) except as prohibited by other law, all of the rights, privileges, immunities, powers, and purposes of each constituent organization that ceases to exist vest in the surviving organization;

(7) except as otherwise provided in the plan of merger, the terms and conditions of the plan of merger take effect;

(8) except as otherwise agreed, if a constituent limited partnership ceases to exist, the merger does not dissolve the limited partnership for the purposes of subchapter 8;

(9) if the surviving organization is created by the merger:

(A) if it is a limited partnership, the certificate of limited partnership becomes effective; or

(B) if it is an organization other than a limited partnership, the organizational document that creates the organization becomes effective; and

(10) if the surviving organization preexists the merger, any amendments provided for in the articles of merger for the organizational document that created the organization become effective.

(b) A surviving organization that is a foreign organization consents to the jurisdiction of the courts of this State to enforce any obligation owed by a constituent organization, if before the merger the constituent organization was subject to suit in this State on the obligation. A surviving organization that is a foreign organization and not authorized to transact business in this State may be served with process under § 4-20-113 if the surviving organization:

(1) Fails to appoint an agent for service of process under § 4-20-112;

(2) No longer has an agent for service of process; or

(3) Has an agent for service of process that cannot with reasonable diligence be served.

**History.** Acts 2007, No. 15, § 1; 2007, No. 638, § 68; 2009, No. 814, § 19.

**Amendments.** The 2007 amendment by No. 638 substituted “may be served with process at the address required in the articles of merger under § 4-47-1108(b)(7)” for “appoints the Secretary of State as its agent for service of process for the purposes of enforcing an obligation under this subsection. Service on the Secretary of State under this subsection is made in the same manner and with the same consequences as in § 4-47-117(c) and (d)” in (b).

The 2009 amendment, in (b), substituted “under § 4-20-113 if the surviving organization” for “at the address required in the articles of merger under § 4-47-1108(b)(7)” in the introductory language, added (b)(1), (b)(2), and (b)(3), and made a related change.

**Effective Dates.** Acts 2007, No. 638, § 70: Effective date clause provided: “Effective date. This act takes effect September 1, 2007.”

#### **4-47-1110. Restrictions on approval of conversions and mergers and on relinquishing limited liability limited partnership status.**

(a) If a partner of a converting or constituent limited partnership will have personal liability with respect to a converted or surviving organization, approval and amendment of a plan of conversion or merger are ineffective without the consent of the partner, unless:

(1) the limited partnership’s partnership agreement provides for the approval of the conversion or merger with the consent of fewer than all the partners; and

(2) the partner has consented to the provision of the partnership agreement.

(b) An amendment to a certificate of limited partnership which deletes a statement that the limited partnership is a limited liability limited partnership is ineffective without the consent of each general partner unless:

(1) the limited partnership's partnership agreement provides for the amendment with the consent of less than all the general partners; and

(2) each general partner that does not consent to the amendment has consented to the provision of the partnership agreement.

(c) A partner does not give the consent required by subsection (a) or (b) merely by consenting to a provision of the partnership agreement which permits the partnership agreement to be amended with the consent of fewer than all the partners.

**History.** Acts 2007, No. 15, § 1.

#### **4-47-1111. Liability of general partner after conversion or merger.**

(a) A conversion or merger under this chapter does not discharge any liability under §§ 4-47-404 and 4-47-607 of a person that was a general partner in or dissociated as a general partner from a converting or constituent limited partnership, but:

(1) the provisions of this chapter pertaining to the collection or discharge of the liability continue to apply to the liability;

(2) for the purposes of applying those provisions, the converted or surviving organization is deemed to be the converting or constituent limited partnership; and

(3) if a person is required to pay any amount under this subsection:

(A) the person has a right of contribution from each other person that was liable as a general partner under § 4-47-404 when the obligation was incurred and has not been released from the obligation under § 4-47-607; and

(B) the contribution due from each of those persons is in proportion to the right to receive distributions in the capacity of general partner in effect for each of those persons when the obligation was incurred.

(b) In addition to any other liability provided by law:

(1) a person that immediately before a conversion or merger became effective was a general partner in a converting or constituent limited partnership that was not a limited liability limited partnership is personally liable for each obligation of the converted or surviving organization arising from a transaction with a third party after the conversion or merger becomes effective, if, at the time the third party enters into the transaction, the third party:

(A) does not have notice of the conversion or merger; and

(B) reasonably believes that:

(i) the converted or surviving business is the converting or constituent limited partnership;

(ii) the converting or constituent limited partnership is not a limited liability limited partnership; and

(iii) the person is a general partner in the converting or constituent limited partnership; and

(2) a person that was dissociated as a general partner from a converting or constituent limited partnership before the conversion or merger became effective is personally liable for each obligation of the converted or surviving organization arising from a transaction with a third party after the conversion or merger becomes effective, if:

(A) immediately before the conversion or merger became effective the converting or surviving limited partnership was not a limited liability limited partnership; and

(B) at the time the third party enters into the transaction less than two years have passed since the person dissociated as a general partner and the third party:

(i) does not have notice of the dissociation;

(ii) does not have notice of the conversion or merger; and

(iii) reasonably believes that the converted or surviving organization is the converting or constituent limited partnership, the converting or constituent limited partnership is not a limited liability limited partnership, and the person is a general partner in the converting or constituent limited partnership.

**History.** Acts 2007, No. 15, § 1.

#### **4-47-1112. Power of general partners and persons dissociated as general partners to bind organization after conversion or merger.**

(a) An act of a person that immediately before a conversion or merger became effective was a general partner in a converting or constituent limited partnership binds the converted or surviving organization after the conversion or merger becomes effective, if:

(1) before the conversion or merger became effective, the act would have bound the converting or constituent limited partnership under § 4-47-402; and

(2) at the time the third party enters into the transaction, the third party:

(A) does not have notice of the conversion or merger; and

(B) reasonably believes that the converted or surviving business is the converting or constituent limited partnership and that the person is a general partner in the converting or constituent limited partnership.

(b) An act of a person that before a conversion or merger became effective was dissociated as a general partner from a converting or constituent limited partnership binds the converted or surviving organization after the conversion or merger becomes effective, if:

(1) before the conversion or merger became effective, the act would have bound the converting or constituent limited partnership under § 4-47-402 if the person had been a general partner; and

(2) at the time the third party enters into the transaction, less than two years have passed since the person dissociated as a general partner and the third party:

(A) does not have notice of the dissociation;

(B) does not have notice of the conversion or merger; and

(C) reasonably believes that the converted or surviving organization is the converting or constituent limited partnership and that the person is a general partner in the converting or constituent limited partnership.

(c) If a person having knowledge of the conversion or merger causes a converted or surviving organization to incur an obligation under subsection (a) or (b), the person is liable:

(1) to the converted or surviving organization for any damage caused to the organization arising from the obligation; and

(2) if another person is liable for the obligation, to that other person for any damage caused to that other person arising from the liability.

**History.** Acts 2007, No. 15, § 1.

#### **4-47-1113. Chapter not exclusive.**

This chapter does not preclude an entity from being converted or merged under other law.

**History.** Acts 2007, No. 15, § 1.

### **SUBCHAPTER 12 — MISCELLANEOUS PROVISIONS**

#### **SECTION.**

4-47-1201. Uniformity of application and construction.

4-47-1202. Severability clause.

4-47-1203. Relation to Electronic Signatures in Global and National Commerce Act.

4-47-1204. Effective date.

#### **SECTION.**

4-47-1205. [Reserved.]

4-47-1206. Application to existing relationships.

4-47-1207. Savings clause.

4-47-1208. Effect of designation.

4-47-1209. Formation of future limited partnerships.

#### **4-47-1201. Uniformity of application and construction.**

In applying and construing this Uniform Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among States that enact it.

**History.** Acts 2007, No. 15, § 1.

**4-47-1202. Severability clause.**

If any provision of this chapter or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are severable.

**History.** Acts 2007, No. 15, § 1.

**4-47-1203. Relation to Electronic Signatures in Global and National Commerce Act.**

This chapter modifies, limits, or supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001 et seq., but this chapter does not modify, limit, or supersede § 101(c) of that Act or authorize electronic delivery of any of the notices described in § 103(b) of that Act.

**History.** Acts 2007, No. 15, § 1.

**4-47-1204. Effective date.**

This chapter takes effect on September 1, 2007.

**History.** Acts 2007, No. 15, § 1.

**4-47-1205. [Reserved.]****4-47-1206. Application to existing relationships.**

(a) Except as otherwise provided in subsection (b), on and after September 1, 2007, this chapter governs all limited partnerships.

(b) With respect to a limited partnership formed before this chapter takes effect, the following rules apply except as the partners otherwise elect in the manner provided in the partnership agreement or by law for amending the partnership agreement:

(1) section 4-47-104(c) does not apply and the limited partnership has whatever duration it had under the law applicable immediately before the limited partnership became subject to this chapter;

(2) the limited partnership is not required to amend its certificate of limited partnership to comply with § 4-47-201(a)(4);

(3) sections 4-47-601 and 4-47-602 do not apply and a limited partner has the same right and power to dissociate from the limited partnership, with the same consequences, as existed immediately before the limited partnership became subject to this chapter;

(4) section 4-47-603(4) does not apply;

(5) section 4-47-603(5) does not apply and a court has the same power to expel a general partner as the court had immediately before the limited partnership became subject to this chapter; and

(6) section 4-47-801(3) does not apply and the connection between a person's dissociation as a general partner and the dissolution of the limited partnership is the same as existed immediately before the limited partnership became subject to this chapter.

(c) If subsection (a) causes a limited partnership that was a limited liability limited partnership under § 4-43-1110 [repealed] to become subject to this chapter:

(1) if immediately before it became subject to this chapter its name complied with § 4-43-1110 [repealed], the affected limited partnership may maintain its name even if the name does not comply with § 4-47-108(c); and

(2) the application to register the limited partnership that was a limited liability limited partnership under § 4-43-1110 [repealed] on file with the Secretary of State pursuant to § 4-43-1110 [repealed] is deemed to amend the limited partnership's certificate of limited partnership to state that the limited partnership is a limited liability limited partnership.

**History.** Acts 2007, No. 15, § 1.

#### **4-47-1207. Savings clause.**

This chapter does not affect an action commenced, proceeding brought, or right accrued before this chapter takes effect.

**History.** Acts 2007, No. 15, § 1.

#### **4-47-1208. Effect of designation.**

Except as otherwise provided in this chapter, a limited partnership remains the same entity for purposes of holding title to or conveying an interest in real or personal property and for all other purposes:

(1) During the winding up of the limited partnership following its dissolution;

(2) Whether the certificate of limited partnership is amended to add or delete a statement that the limited partnership is a limited liability limited partnership pursuant to § 4-47-406(b)(2); and

(3) Regardless of whether the words "limited partnership", "limited liability limited partnership", or the designation "LP", "L.P.", "LLLP", or "L.L.L.P." are used in an instrument conveying an interest in real or personal property to or from the limited partnership or in any other writing.

**History.** Acts 2007, No. 15, § 1.

#### **4-47-1209. Formation of future limited partnerships.**

Beginning on September 1, 2007, no person may form an entity under the Revised Limited Partnership Act of 1991, § 4-43-101 et seq. [repealed].

**History.** Acts 2007, No. 15, § 1.

**SUBCHAPTER 13 — FILING FEES**

SECTION.

4-47-1301. Fees for limited partnerships.

4-47-1302. Fees for limited liability limited partnerships.

**Effective Dates.** Acts 2007, No. 638, § 70: Sept. 1, 2007.

Acts 2007, No. 646, § 14: July 1, 2007. Emergency clause provided: “It is found and determined by the General Assembly of the State of Arkansas that business entities are presently paying different fees for similar services from the Secretary of State; that this act will alleviate any undue hardship to any entity by standardiz-

ing business and commercial filing fees; and that this act is immediately necessary to aid the recordkeeping and accounting functions of the Secretary of State and should take effect at the beginning of the state’s fiscal year. Therefore, an emergency is declared to exist and this act being necessary for the preservation of the public peace, health, and safety shall become effective on July 1, 2007.”

**4-47-1301. Fees for limited partnerships.**

(a) The Secretary of State shall collect the following fees when the documents described in this subsection are delivered to him or her for filing by a domestic or foreign limited partnership:

Document	Fee
(1) Registration of certificate of domestic limited partnership .....	\$ 50.00
(2) Registration of certificate of foreign limited partnership .....	300.00
(3) Amendment of certificate of limited partnership .....	15.00
(4) Change of agent for service .....	No Fee
(5) Cancellation or dissolution of certificate of limited partnership .....	15.00
(6) Assignment of limited partnership interest . .....	15.00
(7) Withdrawal of general partner .....	15.00
(8) Admission of new general partner .....	15.00
(9) Merger or consolidation of limited partnership with limited liability company.....	15.00

(b) The Secretary of State shall collect a fee of twenty-five dollars (\$ 25.00) each time process is served on him or her under this chapter. The party to a proceeding causing service of process is entitled to recover the service of process fee as costs if the party prevails in the proceeding.

(c) The Secretary of State shall collect the following fees for copying and certifying the copy of any filed document relating to a domestic or foreign limited liability limited partnership:

- (1) Fifty cents (50¢) per page for copying; and
- (2) Five dollars (\$ 5.00) for the certificate.

(d) The Secretary of State shall collect the following fees when the documents described in this subsection are delivered to him or her by electronic means:

Document	Fee	Processing Fee
(1) Application for fictitious name for domestic limited partnership .....	\$ 9.50	.....\$ 4.00
(2) Application for fictitious name of foreign limited partnership .....	\$ 9.50	.....\$ 4.00

**History.** Acts 2007, No. 15, § 1; 2007, No. 638, § 69; 2007, No. 646, § 13.

**A.C.R.C. Notes.** Pursuant to § 1-2-207, this section is set out as amended by Acts 2007, No. 646, § 13. Acts 2007, No. 638 also amended this section by deleting the provisions of (a)(4) entirely.

**Amendments.** The 2007 amendment

by No. 638 deleted (a)(4) and redesignated the remaining subdivisions accordingly.

The 2007 amendment by No. 646 substituted “No Fee” for “15.00” in (a)(4).

**Effective Dates.** Acts 2007, No. 638, § 70: Effective date clause provided: “Effective date. This act takes effect September 1, 2007.”

4-47-1302. Fees for limited liability limited partnerships.

(a) The Secretary of State shall collect the following fees when the documents described in this subsection (a) are delivered to him or her for filing:

Document	Fee
(1) Application for Registration of Limited Liability Limited Partnership .....	\$50.00
(2) Amendment of Certificate of Limited Liability Limited Partnership (includes change or withdrawal of general partner) .....	25.00
(3) Restatement of Certificate of Limited Liability Limited Partnership. ....	25.00
(4) Withdrawal of Domestic Limited Liability Limited Partnership .....	25.00
(5) Application for Certificate of Authority by Foreign Limited Liability Limited Partnership .	300.00
(6) Application for Amended Certificate of Authority by Foreign Limited Liability Limited Partnership (includes change or withdrawal or general partner) .....	300.00
(7) Application for Certificate of Withdrawal by Foreign Limited Liability Limited Partnership .....	25.00
(8) Application for Certificate of Existence or Authorization by Domestic Limited Liability Limited Partnership .....	15.00

(9) Application for Registration as a Limited Partnership and Limited Liability Limited Partnership .....	50.00
(10) Any other document required or permitted to be filed by this chapter .....	15.00

(b) The Secretary of State shall collect a fee of twenty-five dollars (\$25.00) each time process is served on him or her under this section. The party to a proceeding causing service of process is entitled to recover the service of process fee as costs if the party prevails in the proceeding.

(c) The Secretary of State shall collect the following fees for copying and certifying the copy of any filed document relating to a domestic or foreign limited liability limited partnership:

- (1) Fifty cents (50¢) per page for copying; and
- (2) Five dollars (\$5.00) for the certificate.

**History.** Acts 2007, No. 15, § 1.

## ***SUBTITLE 5. CONTRACTS, NOTES, AND OTHER COMMERCIAL INSTRUMENTS***

### **CHAPTER 56**

#### **GENERAL PROVISIONS**

**SECTION.**

4-56-101. Attorney's fees.

4-56-102. Unlawful acts relating to secured interests on certain farm products.

**SECTION.**

4-56-103. Reimbursement for taxes.

4-56-104. Hold harmless clause in construction contracts unenforceable.

#### **4-56-101. Attorney's fees.**

(a) A provision in a promissory note for the payment of reasonable attorney's fees, not to exceed ten percent (10%) of the amount of principal due, plus accrued interest, for services actually rendered in accordance with its terms is enforceable as a contract of indemnity.

(b) This section shall apply only to notes executed from and after June 7, 1951.

**History.** Acts 1951, No. 350, §§ 1, 2;  
A.S.A. 1947, §§ 68-910, 68-910n.

#### **RESEARCH REFERENCES**

**Ark. L. Rev.** Taxability of Attorneys' Fees as Costs, 9 Ark. L. Rev. 70.

Note, A Secured Party's Right to Recover Attorney's Fees and Expenses:

*Svestka v. First National Bank in Stuttgart*, 35 Ark. L. Rev. 579.

## CASE NOTES

## ANALYSIS

Constitutionality.

In General.

Applicability.

Agreements Other Than Notes.

Allowance.

Amount.

Priority.

Terms of Note.

**Constitutionality.**

Provision permitting the parties to a note to agree upon a reasonable attorney's fee for the creditor, is not unconstitutional. *Hollaway v. Pocahontas Fed. Sav. & Loan Ass'n*, 230 Ark. 310, 323 S.W.2d 204 (1959); *Hughes v. Lee*, 238 Ark. 547, 383 S.W.2d 97 (1964).

**In General.**

Notwithstanding that the parties have contracted for the recovery of attorney's fees, a party cannot recover attorney's fees unless such fees are expressly provided for by statute. *White v. Associates Com. Corp.*, 20 Ark. App. 140, 725 S.W.2d 7 (1987).

**Applicability.**

This section provides for attorney's fees only where the underlying instrument is a promissory note. *White v. Associates Com. Corp.*, 20 Ark. App. 140, 725 S.W.2d 7 (1987).

Section 4-9-504 allowing, to the extent provided for in the agreement and not prohibited by law, the reasonable attorney's fees and legal expenses incurred by a secured party in obtaining collateral subsequent to default by a purchaser, is limited by the requirement of this section that the underlying instrument be a promissory note. *White v. Associates Com. Corp.*, 20 Ark. App. 140, 725 S.W.2d 7 (1987).

**Agreements Other Than Notes.**

A provision in a security instrument for allowance of attorney's fees cannot be enforced under this section since the section limits enforcement of such provisions to those contained in promissory notes. *National Bank v. Blankenship*, 177 F. Supp. 667 (E.D. Ark. 1959), *aff'd*, *National Bank of Eastern Arkansas v. General Mills, Inc.*, 283 F.2d 574 (8th Cir. Ark. 1960).

Trial court could not award attorney's fees on the basis of percentage of both unpaid balance of a note and unpaid open account, since this section limits enforcement of provisions for attorney's fees to those contained in promissory note. *Bleidt v. 555, Inc.*, 253 Ark. 766, 489 S.W.2d 235 (1973).

A secured creditor was entitled to allowance of attorney fees as provided in an installment sales contract after the debtor filed a petition for bankruptcy. *In re Morris*, 602 F.2d 826 (8th Cir. 1979). But see *Harper v. Wheatley Implement Co.*, 278 Ark. 27, 643 S.W.2d 537 (1982).

Attorney's fees are not allowed except when expressly provided for by statute; accordingly, since this section provides for attorney's fees only on promissory notes, the trial court erred in allowing attorney's fees in an action brought on an installment sales contract. *Harper v. Wheatley Implement Co.*, 278 Ark. 27, 643 S.W.2d 537 (1982). But see *In re Morris*, 602 F.2d 826 (8th Cir. 1979).

In cases not involving promissory notes, a secured party may not collect attorney's fees incurred for services rendered by an attorney in obtaining possession of collateral after default by the purchaser, even though the parties may have contracted for such fees. *White v. Associates Com. Corp.*, 20 Ark. App. 140, 725 S.W.2d 7 (1987).

**Allowance.**

Fee allowed where attorney's services were necessary in order to recover on note. *American-Canadian Oil & Drilling Corp. v. Aldridge & Stroud, Inc.*, 237 Ark. 407, 373 S.W.2d 148 (1963); *Hughes v. Lee*, 238 Ark. 547, 383 S.W.2d 97 (1964).

The holder of a note was entitled to attorney's fee even though he failed to recover the full amount claimed. *Hughes v. Lee*, 238 Ark. 547, 383 S.W.2d 97 (1964).

**Amount.**

Where collateral note contained a provision for attorney's fees as authorized by law if not paid when due and placed in the hands of an attorney for collection, an attorney's fee of the maximum statutorily allowed percentage could be allowed for services actually rendered in accordance with the terms of the note which is en-

forceable as a contract of indemnity. *May v. National Bank*, 231 Ark. 588, 331 S.W.2d 697 (1960).

The court properly allowed a maximum statutory attorney's fee on note, although the same attorneys represented both the maker and the payee, where the maker admitted the validity of the note and that it was due and payable, but its validity was challenged by other parties to the action not represented by these attorneys. *American-Canadian Oil & Drilling Corp. v. Aldridge & Stroud, Inc.*, 237 Ark. 407, 373 S.W.2d 148 (1963).

The time spent and labor required, the novelty and difficulty of the questions involved and the skill required and exercised by the attorneys indicate that the fee allowed by this section is a reasonable fee in this case. *First Nat'l Bank v. Magnolia Steel Corp.*, 261 F. Supp. 283 (W.D. Ark. 1966).

Where promissory notes provided that upon default and collection the promisor must pay ten percent attorney's fees, an award of five percent on the past due principal and interest on the notes as attorney's fees was proper. Although the fee may not exceed the percentage specified in this section, it is within the court's province to determine if the percentage to which the parties agreed is reasonable in view of time and labor involved, the novelty of the question, the necessary skill involved, the customary charges of the bar, the amount in controversy and the benefit resulting to the client for the services. *First Nat'l Bank v. Nash*, 2 Ark. App. 135, 617 S.W.2d 24 (1981).

This section cannot be interpreted to limit the amount of attorney's fees which can be awarded in an action to recover on a promissory note. *Loewer v. National Bank*, 311 Ark. 354, 844 S.W.2d 329 (1992).

#### **Priority.**

Federal tax liens were entitled to priority over the mortgagee's claim for an at-

torney's fee because the latter was inchoate when the federal tax liens were filed, inasmuch as at that time the amount of the attorney's fee was uncertain, and there was no showing that the mortgagee had become obligated to pay and had paid any sum for legal services performed prior to the filing of the federal tax lien. *United States v. Pioneer Am. Ins. Co.*, 374 U.S. 84, 83 S. Ct. 1651, 10 L. Ed. 2d 770 (1963), superseded by statute as stated in, *Hayden v. Prevatte*, 327 F. Supp. 635 (D.S.C. 1971), superseded by statute as stated in, *Aetna Ins. Co. v. United States*, 456 F.2d 773 (1972), superseded by statute as stated in, *United States v. California-Oregon Plywood, Inc.*, 527 F.2d 687 (9th Cir. Cal. 1975), superseded by statute as stated in, *United States v. Crittenden*, 563 F.2d 678 (5th Cir. Ga. 1977), superseded by statute as stated in, *Shawnee State Bank v. United States*, 735 F.2d 308 (8th Cir. Mo. 1984).

#### **Terms of Note.**

Failure of a note to provide for attorney's fees was supplied by incorporating in such note by reference a deed of trust which contained a provision for attorney's fees. *Geyer v. First Ark. Dev. Fin. Corp.*, 245 Ark. 694, 434 S.W.2d 301 (1968).

Where promissory note defined "default" in terms of failure to pay a monthly installment when due and attorney's fees were provided for only in case of "default," the note did not provide for attorneys' fees in an action to collect on the note in event of acceleration based on a due on sale clause. *Schulte v. Benton Sav. & Loan Ass'n*, 279 Ark. 275, 651 S.W.2d 71 (1983).

**Cited:** *Lewallen v. Bethune*, 267 Ark. 976, 593 S.W.2d 64 (1980); *Hough v. Continental Leasing Corp.*, 275 Ark. 340, 630 S.W.2d 19 (1982); *Halford v. Southern Capital Corp.*, 279 Ark. 261, 650 S.W.2d 580 (1983); *Damron v. University Estates, Phase II, Inc.*, 295 Ark. 533, 750 S.W.2d 402 (1988); *First Nat'l Bank v. Griffin*, 310 Ark. 164, 832 S.W.2d 816 (1992).

### **4-56-102. Unlawful acts relating to secured interests on certain farm products.**

(a) It shall be unlawful for any person who buys soybeans, corn, wheat, rice, or milo from a person engaged in farming operations, or for any commission merchant or selling agent who sells soybeans, corn, wheat, rice, or milo for a person engaged in farming operations for a fee

or commission, to knowingly fail to include as joint payee on the check or other instrument issued in payment for the farm products the name of any person disclosed by the seller as having a security interest in the farm products.

(b) It shall be unlawful for any person engaged in farming operations who sells soybeans, corn, wheat, rice, or milo to knowingly fail to disclose the names of any parties having a security interest in the farm products before accepting payment of the proceeds of the sale.

(c)(1) It shall be unlawful for a person who owes payment or other performance of an obligation under a security agreement to sell or otherwise dispose of soybeans, corn, wheat, rice, or milo used as collateral or any part thereof and to knowingly fail to pay to the secured party the amount of the proceeds from such sale or other disposition if the person:

(A) Has no right to sell or otherwise dispose of the farm products used as collateral; or

(B) Has the right to sell or otherwise dispose of the farm products used as collateral, provided that the secured party receives the proceeds from such sale or other disposition.

(2) Failure to pay the proceeds to the secured party within ten (10) days after the sale or other disposition of the collateral shall be prima facie evidence of a knowing failure to pay under this section.

(d) A violation of this section shall be a Class C felony.

(e) The terms used in this section shall have the same meaning as used in the Uniform Commercial Code, Acts 1961, No. 185, as amended.

**History.** Acts 1985, No. 1067, §§ 1, 2; 1985, No. 1085, §§ 1, 2; A.S.A. 1947, §§ 41-2304.1, 41-2304.2; Acts 2005, No. 1994, § 415.

**Publisher's Notes.** The Uniform Commercial Code, Acts 1961, No. 185, referred to in this section, is codified as subtitle 1 of this title.

## RESEARCH REFERENCES

**Ark. L. Notes.** Pedersen, Crop Financing: A Guide to Arkansas Law, 1988 Ark. L. Notes 31.

### 4-56-103. Reimbursement for taxes.

(a)(1) If a contract requires one (1) party to reimburse another party for the federal excise tax imposed by 26 U.S.C. § 4081 or 26 U.S.C. § 4091, whether as a separate item or as part of the contract price, the reimbursing party at its option and notwithstanding contrary terms of the contract shall not be required to make the reimbursement more than one (1) business day before the day on which the reimbursed party must remit the taxes to the Internal Revenue Service.

(2) Exercise of the option provided by subdivision (a)(1) of this section shall not relieve the reimbursing party of its obligation to make the reimbursement as required by the contract but shall affect only the timing of that reimbursement.

(b)(1) Written notice of the reimbursing party's intent to exercise the option provided in subsection (a) of this section shall be given to the reimbursed party.

(2) The notice shall state the effective date of the exercise of the option which shall be no earlier than thirty (30) days after the notice of intent is received by the reimbursed party or the beginning of the reimbursed party's next federal tax quarter, whichever is later.

(c)(1) If a reimbursing party exercises the option provided in subsection (a) of this section, the reimbursed party may demand security for the payment of the taxes in proportion to the amount the taxes represent compared to the security demanded on the contract as a whole.

(2) The reimbursed party may also require reimbursement to be made by electronic transfer of funds but may not change the other payment terms of the contract without a valid business reason.

(d)(1) This section shall apply to all contracts that are:

(A) Continuing contracts with no fixed expiration date and in effect on August 12, 2005; or

(B) Entered into or renewed after August 12, 2005.

(2) All contracts in effect on August 12, 2005, that contain a fixed expiration date shall be governed by the law as it existed prior to August 12, 2005.

**History.** Acts 2005, No. 254, § 1.

**U.S. Code.** Section 4081 of the Internal Revenue Code, Chapter 32, referred to in (a)(1), provides for the imposition of an excise tax on motor fuels. Section 4091 of

the Internal Revenue Code, also referred to in (a)(1), provided for the imposition of tax on commercial aviation fuel and was repealed on October 22, 2004, by Pub. L. 108-357.

#### **4-56-104. Hold harmless clause in construction contracts unenforceable.**

(a) As used in this section:

(1) "Construction" means any of the following services, functions, or combination of the following services or functions to construct a building, building site, or structure, to construct a permanent improvement to a building, building site, or structure, including sitework:

(A) Alteration;

(B) Design;

(C) Erection;

(D) Reconditioning;

(E) Renovation;

(F) Repair; or

(G) Replacement;

(2)(A) "Construction agreement" means the bargain of the parties in fact, as found in the language of the parties or inferred from other circumstances, including course of performance, course of dealing, or usage of trade as provided in § 4-1-303.

(B) “Construction agreement” does not include an insurance contract, a construction bond, or a contract to defend a party against liability; and

(3)(A) “Construction contract” means the total legal obligation that results from the parties’ agreement as supplemented by any other applicable law.

(B) “Construction contract” does not include an insurance contract, a construction bond, or a contract to defend a party against liability.

(b) A clause in a construction agreement or construction contract entered into after July 31, 2007, is unenforceable as against public policy to the extent that a party to the construction contract or construction agreement is required to indemnify, defend, or hold harmless another party against:

(1) Damage from death or bodily injury to a person arising out of the sole negligence of the indemnitee, its agent, representative, subcontractor, or supplier; or

(2) Damage to property arising out of the sole negligence of the indemnitee, its agent, representative, subcontractor, or supplier.

(c) A provision or understanding in a construction agreement or construction contract that attempts to circumvent this section by making the construction agreement or construction contract subject to the laws of another state is unenforceable as against public policy.

(d) A clause described under subsections (b) and (c) of this section is severable from the construction agreement or construction contract and shall not cause the entire construction agreement or construction contract to become unenforceable.

(e) The parties to a construction contract or construction agreement may enter into an agreement in which:

(1) The first party indemnifies, defends, or holds harmless the second party from the first party’s negligence or fault or from the negligence or fault of the first party’s agent, representative, subcontractor, or supplier;

(2) The first party requires the second party to provide liability insurance coverage for the first party’s negligence or fault if the construction contract or construction agreement requires the second party to obtain insurance and the construction contract or construction agreement limits the second party’s obligation to the cost of the required insurance;

(3) The first party requires the second party to provide liability insurance coverage for the first party’s negligence or fault under a separate insurance contract with an insurance provider; or

(4) The first party requires the second party to name the first party as an additional insured as a part of the construction agreement or construction contract.

**History.** Acts 2007, No. 874, § 2; 2009, No. 540, § 2; 2011, No. 719, § 1.

**Amendments.** The 2009 amendment, in (a)(1), deleted “or” preceding “func-

tions,” substituted “to construct a” for “or” preceding “permanent,” and added “including sitework” at the end; deleted “or fault” following “negligence” in (b)(1) and

(2); rewrote the introductory language of (e); and made minor stylistic changes.

The 2011 amendment substituted "the language of the parties" for "their language" in (a)(2)(A).

## CHAPTER 57

### INTEREST AND USURY

#### SECTION.

- 4-57-101. Calculation of interest.
- 4-57-102. Reservation or discounting of interest permitted.
- 4-57-103. Statement of principal and interest.
- 4-57-104. Maximum rate of interest permitted.

#### SECTION.

- 4-57-105. Usurious interest prohibited.
- 4-57-106. [Repealed.]
- 4-57-107. [Repealed.]
- 4-57-108. Usurious consumer loans or credit sales — Award of attorney's fees.

**Cross References.** Maximum lawful rates of interest, Ark. Const. Amend. 60.

**Preambles.** Acts 1953, No. 330, contained a preamble which read: "Whereas, since the passage of the Act set forth in Section 9394 of Pope's Digest and in Section 68-604 of Arkansas Statutes (1947) Annotated limiting the reserving of or discounting interest upon commercial paper, mortgages or other securities for periods in excess of 12 months, substantial changes have taken place in our economy, beneficial to our people; and

"Whereas, many loans are being made to the citizens of this State for property improvement under Title I of the National Housing Act, discounted for periods up to 36 months by banks, trust companies, mortgage loan and other companies; and

"Whereas, automobiles, refrigerators,

radios, stoves, freezers, farm equipment, tractors, and other items are being financed for purchasers over periods extending to 36 months; Now Therefore,

"In order to eliminate any question as to the legality of reserving or discounting interest upon commercial paper, mortgages or other securities for periods in excess of 12 months...."

**Effective Dates.** Acts 1868, No. 9, § 9: effective on passage.

Acts 1875, No. 56, § 7: effective on passage.

Acts 1887, No. 39, § 4: effective on passage and applicable to all usurious contracts and securities whether executed before or after its passage.

Acts 1895, No. 150, § 2: effective on passage.

### RESEARCH REFERENCES

**ALR.** Variable interest rate: usury in connection with loan calling for. 18 A.L.R.4th 1068.

Validity and construction of state statute or rule allowing or changing rate of prejudgment interest in tort actions. 40 A.L.R.4th 147.

Retrospective application and effect of state statute or rule allowing interest or changing rate of interest on judgments or verdicts. 41 A.L.R.4th 694.

**Am. Jur.** 45 Am. Jur. 2d, Interest & U., § 1 et seq.

**Ark. L. Rev.** Survey of Usury Laws, 6 Ark. L. Rev. 26.

The Usury Law in Arkansas — A Study in Evasion, 8 Ark. L. Rev. 399.

The Impact of Usury Law on Banks in Arkansas, 8 Ark. L. Rev. 420.

Recent Developments: Usury: A "Commitment Fee" or "Service Charge" Disbursed From Principal After Closing Is Interest, Arkansas Sav. & Loan Asso. v. Mack Trucks of Arkansas, Inc., 263 Ark. 264, 566 S.W.2d 128 (1978), 32 Ark. L. Rev. 608.

Clark, Interpretation of the Arkansas Usury Law: A Continuation of a Conservative Trend, 33 Ark. L. Rev. 518.

Comments, Usury: Issues in Calculation, 34 Ark. L. Rev. 442.

Note, Conditional Sales Contracts, True Leases, and the Lessee's Right to Terminate, 43 Ark. L. Rev. 899.

Note, Compound Pre-Judgment Interest as an Element of Just Compensation: *Wilson v. City of Fayetteville*, 47 Ark. L. Rev. 937.

**C.J.S.** 47 C.J.S., Interest & U., § 1 et seq.

**U. Ark. Little Rock L.J.** Note: *Cagle v. Boyle Mortgage Co.*, 1 U. Ark. Little Rock L.J. 86.

Davis, Note: Commercial Law — Usury — Lease Construed as Installment Sale, 2 U. Ark. Little Rock L.J. 112.

Mitchell and Barrier, Usury in Arkansas — Revisited, Revised and Reaffirmed, 2 U. Ark. Little Rock L.J. 323.

A Continuing History of Arkansas's Usury Law: On the Verge of Extinction?, 25 U. Ark. Little Rock L. Rev. 819.

#### 4-57-101. Calculation of interest.

(a) Whenever in any statute, deed, written or verbal contract, or in any public or private instrument whatever, any certain interest is or may be mentioned, and no period of time is stated for the rate of interest to be calculated, interest shall be calculated at the rate mentioned by the year, in the same manner as if the words "per annum" or "by the year" had been added to the rate.

(b)(1) For the purpose of calculating interest, a month shall be considered the twelfth part of a year, and as consisting of thirty (30) days.

(2) Interest for any number of days less than a month shall be estimated by the proportion which the number of days shall bear to thirty (30).

(c)(1) In calculating interest where partial payments may have been made, the interest shall be calculated to the time when the first payment shall have been made, and the payment shall be applied to the payment of the interest. If the payment exceeds the interest, the balance shall be applied to diminish the principal, and the same course shall be observed in all subsequent payments.

(2) However, in no case when a payment falls short of paying the interest due at the time of making the payment shall the balance of the interest be added to the principal.

**History.** Rev. Stat., ch. 80, §§ 10-12; C. §§ 9396-9398; A.S.A. 1947, §§ 68-605 — & M. Dig., §§ 7357-7359; Pope's Dig., 68-607.

#### RESEARCH REFERENCES

**U. Ark. Little Rock L.J.** Note: *Cagle v. Boyle Mortgage Co.*, 1 U. Ark. Little Rock L.J. 86.

## CASE NOTES

## ANALYSIS

Applicability.  
Compound Interest.  
Payments.  
Usury.

**Applicability.**

This section does not apply to payments made on advancements in a "building and loan" company contract. *Reeve v. Ladies Bldg. Ass'n*, 56 Ark. 335, 19 S.W. 917 (1892).

**Compound Interest.**

This section does not prevent probate courts from compounding interest in cases of abuse of trust by fiduciaries. *Price v. Peterson*, 38 Ark. 494 (1882).

Where act providing for settlement of indebtedness between counties provided that indebtedness should "bear interest at 5 per cent per annum from date till paid," if the interest was not paid annually, the installments of interest would not bear interest. *State ex rel. Chicot County v. Desha County*, 82 Ark. 360, 99 S.W. 1108 (1907).

Where note provided "if interest be not paid annually, to become as principal and bear the same rate of interest" it was clear that it was intention of parties that interest mature annually instead of at maturity of note. *McNeil v. Harris*, 188 Ark. 706, 67 S.W.2d 602 (1934).

**Payments.**

Under partial payment rule, fact that money was received by borrower on ninth

day of month did not make agreement usurious. *Matthews v. Georgia State Sav. Ass'n*, 132 Ark. 219, 200 S.W. 130 (1918).

Where monthly payments exceed interest on purchase money for a month the payments must be credited as provided in this section. *Rose v. Howell*, 171 Ark. 529, 284 S.W. 776 (1926).

**Usury.**

Contract for loan repayable in monthly installments was not usurious as interest would not be in excess of maximum legal rate. *Lyttle v. Mathews Inv. Co.*, 193 Ark. 849, 103 S.W.2d 47 (1937).

In class action suit against lender for violating usury laws where lender argued that the arbitration clause in its deferred presentment agreement was not a separate agreement, but rather simply part of the whole agreement, and that mutuality had to be analyzed as to the whole agreement, the Supreme Court held that mutuality within the arbitration agreement itself was required. *The Money Place, LLC v. Barnes*, 349 Ark. 411, 78 S.W.3d 714 (2002).

**Cited:** *Gunther v. Cotner*, 192 Ark. 498, 92 S.W.2d 865 (1936); *Hoobler v. Holder*, 239 Ark. 5, 386 S.W.2d 699 (1965); *Davidson v. Commercial Credit Equip. Corp.*, 255 Ark. 127, 499 S.W.2d 68 (1973); *Martin v. Moore*, 269 Ark. 375, 601 S.W.2d 838 (1980); *Svestka v. First Nat'l Bank*, 269 Ark. 237, 602 S.W.2d 604 (1980); *Ford Motor Credit Co. v. Hutcherson*, 277 Ark. 102, 640 S.W.2d 96 (1982).

**4-57-102. Reservation or discounting of interest permitted.**

It shall be lawful for all parties loaning money in this state to reserve or discount interest upon any commercial paper, mortgages, or other securities for any period authorized by any rule or regulation of the Federal Housing Administration or its successor or for a period of at least thirty-six (36) months, whichever is greater, at any rate of interest agreed upon by the parties, the rate of interest not to exceed the applicable rate prescribed by Arkansas Constitution, Article 19, § 13, whether the papers or securities for principal or interest are payable in this state, or any other state, territory, kingdom, or country.

**History.** Acts 1868, No. 9, § 7, p. 32; 1875, No. 56, § 5, p. 145; 1895, No. 150, § 1, p. 235; C. & M. Dig., § 7355; Pope's

Dig., § 9394; Acts 1953, No. 330, § 1; 1961, No. 71, § 1; A.S.A. 1947, § 68-604.

## RESEARCH REFERENCES

**Ark. L. Rev.** Discounting of Commercial Paper, 7 Ark. L. Rev. 341.

## CASE NOTES

### ANALYSIS

Constitutionality.  
Conflict of Laws.  
Discount Rate.  
Length of Contract.

### Constitutionality.

This section is not repugnant to the Constitution and is valid so far as it relates to transactions of a commercial kind in short-time paper. *Vahlberg v. Keaton*, 51 Ark. 534, 11 S.W. 878 (1889); *Baird v. Millwood*, 51 Ark. 548, 11 S.W. 881 (1889).

### Conflict of Laws.

A note and mortgage negotiated, executed, and payable in another state, although on real estate in Arkansas, calling for interest at a rate legal in the other state, but illegal in Arkansas, was governed by the law of the other state on the question of usury. *National Sur. Corp. v. Inland Properties, Inc.*, 286 F. Supp. 173 (E.D. Ark. 1968), *aff'd*, *National Surety Corp. v. Inland Properties, Inc.*, 416 F.2d 457 (8th Cir. Ark. 1969).

### Discount Rate.

Where party to whom promissory note is negotiated, by agreement with maker,

obtains note at greater discount than interest would amount to at maximum statutory rate, the transaction was usurious and void. *German Bank v. DeShon*, 41 Ark. 331 (1883).

### Length of Contract.

Discounting paper running for statutory period was not usury. *Bank of Newport v. Cook*, 60 Ark. 288, 30 S.W. 35 (1895), overruled in part, *Fausett & Co. v. G & P Real Estate, Inc.*, 269 Ark. 481, 602 S.W.2d 669 (1980).

It is usurious to discount paper if the paper runs more than statutory period. *Ellis v. Terrell*, 109 Ark. 69, 158 S.W. 957 (1913); *Castleberry v. Weil*, 142 Ark. 627, 219 S.W. 739 (1920) (preceding decisions prior to 1953 amendment).

This section allows discounting of a note to extend up to statutory period under certain circumstances. *Arkansas Sav. & Loan Asso. v. Mack Trucks of Arkansas, Inc.*, 263 Ark. 264, 566 S.W.2d 128 (1978).

**Cited:** *Bridgeman v. Gateway Ford Truck Sales*, 296 F. Supp. 233 (E.D. Ark. 1969); *Bice Constr. Co. v. CIT Corp.*, 700 F.2d 465 (8th Cir. 1983); *Aetna Life Ins. Co. v. Great Nat'l Corp.*, 818 F.2d 19 (8th Cir. 1987).

## 4-57-103. Statement of principal and interest.

(a) Upon written request of the borrower or debtor, any seller, lender, or any other person, corporation, or legal entity extending credit in this state shall furnish the borrower or debtor at the time of extending credit or of making the sale with a statement separately stating the principal and interest charged for any goods, property, or services sold to the borrower or debtor.

(b)(1) Any creditor willfully refusing to furnish the statement of principal and interest as required in this section or who upon furnishing the statement of principal and interest to the borrower or debtor fraudulently misrepresents the amount of principal or interest paid shall be guilty of a violation and upon conviction shall be subject to a

fine of not less than fifty dollars (\$50.00) nor more than five hundred dollars (\$500).

(2) Each violation of this section shall constitute a separate offense.

**History.** Acts 1969, No. 259, §§ 1, 2; A.S.A. 1947, §§ 68-612, 68-613; Acts 2005, No. 1994, § 37.

#### 4-57-104. Maximum rate of interest permitted.

The parties to any contract, whether the contract is under seal or not, may agree in writing for the payment of interest not exceeding the applicable rate set forth in Arkansas Constitution, Article 19, § 13, on money due or to become due.

**History.** Acts 1875, No. 56, § 1, p. 145; C. & M. Dig., § 7353; Pope's Dig., § 9392; A.S.A. 1947, § 68-602.

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Clark, The Close-Connectedness Doctrine: Preserving Consumer Rights in Credit Transactions, 33 Ark. L. Rev. 490.

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### CASE NOTES

#### ANALYSIS

Accrual of Interest.

Burden of Proof.

Computation.

Evasion.

Governing Law.

Intent.

Multiple Transactions.

Oral Agreements.

Parol Evidence.

Prepayment.

Presumptions.

Property.

Remedies.

Service Charges, Fees, Etc.

—In General.

—Bonus or Commission.

—Insurance.

Taxes.

Usurious Contracts Generally.

#### Accrual of Interest.

Interest is stopped by a lawful tender. Hamlett v. Tallman & Graves, 30 Ark. 505 (1875); Cole v. Moore, 34 Ark. 582 (1879).

A promissory note payable at a future day, and bearing a specified rate of interest from date, without "until paid," bears only that rate of interest after maturity. Newton v. Kennerly, 31 Ark. 626 (1876); Pettigrew v. Summers, 32 Ark. 571 (1877); Woodruff v. Webb, 32 Ark. 612 (1877); Gardner v. Barnett, 36 Ark. 476 (1880); Johnson v. Meyer, 54 Ark. 437, 16 S.W. 121 (1891); Harbison v. Hammons, 113 Ark. 120, 167 S.W. 849 (1914); Jewell Realty Co. v. Kansas City Life Ins. Co., 182 Ark. 397, 31 S.W.2d 521 (1930).

Money due by contract shall bear interest at lawful rate from the time it is due. Roberts v. Wilcoxson & Rose, 36 Ark. 355 (1880); Texas & St. L.R.R. v. Donnelly, 46 Ark. 87 (1885).

Where payments are to be made in instalments, when not paid they will draw lawful interest from time payment was due. Iron Mt. & H.R.R. v. Stansell, 43 Ark. 275 (1884).

Interest is recoverable on insurance policy from time loss is made payable. Southern Ins. Co. v. White, 58 Ark. 277, 24

S.W. 425 (1893); *Phoenix Ins. Co. v. Public Parks Amusement Co.*, 63 Ark. 187, 37 S.W. 959 (1896).

Where there was contest over right to proceeds of certain property and it was agreed that property should be sold and proceeds deposited to await court's action, interest was recoverable only from date of judgment. *Citizens Bank v. Arkansas Compress & Whse. Co.*, 80 Ark. 601, 96 S.W. 997 (1906).

Where person would not have been required to turn over money until demand was made, fact that he improperly paid money to wrong person would not cause interest to run from such payment, but interest would run from date of demand. *Wood & Henderson v. Claiborne*, 82 Ark. 514, 102 S.W. 219 (1907), superseded by statute as stated in, *Walker v. Stephens*, 3 Ark. App. 205, 626 S.W.2d 200 (1981).

Obligation to pay money on a designated future date bears interest from maturity. *Powhatan Zinc & Lead Mining Co. v. Hill*, 98 Ark. 519, 136 S.W. 669 (1911).

Increased rate of interest after maturity, not above the maximum fixed by law, is enforceable. *Red Bud Realty Co. v. South*, 153 Ark. 380, 241 S.W. 21 (1922).

Where note stipulated interest maturity at specific rate and thereafter until paid at same rate per annum, whether it bore interest from date or from maturity was a question for jury. *Heard v. Farmers' Bank*, 174 Ark. 194, 295 S.W. 38 (1927).

Where a note and mortgage provided for a specified rate of interest until maturity and a higher rate thereafter and that upon default before maturity in paying interest or taxes that mortgagee might declare the whole debt due, in such case the mortgagee could recover only the original specified rate of interest from the filing of the suit until the date of the decree. *Jewell Realty Co. v. Kansas City Life Ins. Co.*, 182 Ark. 397, 31 S.W.2d 521 (1930).

### **Burden of Proof.**

The burden of proof of usury is upon the party pleading it. *Holt v. Kirby*, 57 Ark. 251, 21 S.W. 432 (1893).

### **Computation.**

Where mortgage given to secure account provided that items of account which were for money advanced should bear maximum legal rate of interest while

other items should bear lesser rate of interest, interest would be allowed at lesser rate of interest only in a suit to foreclose mortgage if plaintiff failed to separate the items. *Honnett v. Williams*, 66 Ark. 148, 49 S.W. 495 (1899).

Computation of interest at maximum legal rate times borrowed amount on specified date each year regardless of period of time money had been borrowed constituted usury and mortgage securing note was void even though lender thought he was following law since it was not an excusable mistake, such as a mathematical error. *Brooks v. Burgess*, 228 Ark. 150, 306 S.W.2d 104 (1957).

A carrying charge of a straight rate less than maximum legal rate on all sums advanced regardless of the date when the lender actually parted with the money was usurious when the actual interest computed thereon would exceed maximum legal rate per annum. *Harris v. McCann*, 229 Ark. 972, 319 S.W.2d 832 (1959).

### **Evasion.**

A contract to pay at a future date a sum larger than the actual debt with lawful interest, but dischargeable by payment of the debt and lawful interest before that time, is not usurious, unless it is a mere device to evade the usury laws. *Chaffe & Sons v. Landers*, 46 Ark. 364 (1885).

There can be no usury in a sale, but if the sale is a device to cover an usurious loan, it will not be protected by its false cover. *Tillar v. Cleveland*, 47 Ark. 287, 1 S.W. 516 (1886); *Ellenbogen v. Griffey*, 55 Ark. 268, 18 S.W. 126 (1892).

In a suit to enforce a note and mortgage securing it, an allegation in the answer that a lease contract was a part of the transaction of borrowing the money and that the consideration of the lease added to the interest in the note made the transaction usurious was insufficient in the absence of any allegation that the lease was a device to cloak usury. *Leavitt v. Marathon Oil Co.*, 186 Ark. 1077, 57 S.W.2d 814 (1933).

Where the evidence showed that a second loan was a device intended to conceal first loan which was admittedly usurious, the second loan was canceled. *Pacific Fin. Corp. v. Slayton*, 222 Ark. 745, 262 S.W.2d 452 (1953).

**Governing Law.**

Validity of rate as to usury must be determined by usury statutes of state where made unless it designates another place of payment. *Bowles v. Eddy*, 33 Ark. 645 (1878).

Laws of another state held to govern on the question of usury. *White v. Friedlander*, 35 Ark. 52 (1879); *National Sur. Corp. v. Inland Properties, Inc.*, 286 F. Supp. 173 (E.D. Ark. 1968), *aff'd*, *National Surety Corp. v. Inland Properties, Inc.*, 416 F.2d 457 (8th Cir. Ark. 1969); *Bridge-man v. Gateway Ford Truck Sales*, 296 F. Supp. 233 (E.D. Ark. 1969), *modified*, 311 F. Supp. 695 (E.D. Ark. 1970); *Bice Constr. Co. v. CIT Corp.*, 700 F.2d 465 (8th Cir. 1983).

Loan valid where made is valid in Arkansas. *Bank of Harrison v. Gibson*, 60 Ark. 269, 30 S.W. 39 (1895); *Farmers & Mechanics Sav. Co. v. Bazole*, 67 Ark. 252, 54 S.W. 339 (1899).

Place of payment controls as to rate of interest. *Farmers' Sav. & Bldg. & Loan Ass'n v. Ferguson*, 69 Ark. 352, 63 S.W. 797 (1901); *Clarke v. Taylor*, 69 Ark. 612, 65 S.W. 110 (1901); *Crebbin v. Delony*, 70 Ark. 493, 69 S.W. 312 (1902).

Law of Arkansas held to govern legality of interest rate. *Ellis v. Crowe*, 193 Ark. 255, 99 S.W.2d 568 (1936).

In view of fact that Congress had constitutional authority under the commerce clause to set the maximum interest rate that could be charged by FDIC-insured state banks, federal legislation preempted state usury laws, and a promissory note executed and delivered to a state banking association by defendant corporation which agreed to pay interest at a rate allowable under the federal legislation but greater than the state's maximum legal rate was not usurious. *Stephens Sec. Bank v. Eppivic Corp.*, 411 F. Supp. 61 (W.D. Ark. 1976).

**Intent.**

If it was the intention of the parties to reserve or pay more than maximum legal rate, the agreement is void whether the parties knew the interest was usurious or not. *German Bank v. DeShon*, 41 Ark. 331 (1883).

A concurrence of the intent of both parties is not essential. *Garvin v. Linton*, 62 Ark. 370, 35 S.W. 430 (1896), rehearing denied, 62 Ark. 381, 37 S.W. 569 (1896).

There is no usury in contract in which excessive interest is reserved through mistake of fact, but such excess is not recoverable. *Garvin v. Linton*, 62 Ark. 370, 35 S.W. 430 (1896), rehearing denied, 62 Ark. 381, 37 S.W. 569 (1896); *Jarvis v. Southern Grocery Co.*, 63 Ark. 225, 38 S.W. 148 (1896).

The form of the contract is not material and a contract will be held usurious if from all the facts and circumstances in the case it appears that an intent existed at the time of the making of the contract to take and receive, by way of interest, sum of money in excess of that allowed by law. *Habach v. Johnson*, 132 Ark. 374, 201 S.W. 286 (1918).

**Multiple Transactions.**

Note is not usurious because given for money advanced by payee at maker's request to pay off a usurious debt to third person. *Lanier v. Union Mtg., Banking & Trust Co.*, 64 Ark. 39, 40 S.W. 466 (1897).

Taking a new note for the principal and interest of an old one is not usury. *Grider v. Driver*, 46 Ark. 50 (1885); *Morgan v. Rogers*, 166 Ark. 327, 266 S.W. 273 (1924).

An agreement for a loan is not rendered usurious because the lender refused to make it unless the borrower would enter into another contract from which the lender might gain advantage, if the collateral agreement was fair and legal. *Leavitt v. Marathon Oil Co.*, 186 Ark. 1077, 57 S.W.2d 814 (1933).

Where original usurious loan was paid off with proceeds of two subsequent loans, evidence was sufficient to find that the three loans were so inextricably linked together that the usurious nature of the original loan extended to the others. *Public Loan Corp. v. Weaver*, 223 Ark. 902, 270 S.W.2d 888 (1954).

The taint of usury in a subsequent usurious contract does not invalidate a prior lawful contract and the original contract may be enforced if clearly separated from the usury of the subsequent contract. *Hughes v. Holden*, 229 Ark. 15, 316 S.W.2d 710 (1958).

**Oral Agreements.**

An agreement to pay more than six per cent interest on a loan of money would not be enforced unless it is in writing. *Johnson v. Hull*, 57 Ark. 550, 22 S.W. 176 (1893).

One seeking to have a deed declared a mortgage under parol contract to reconvey on repayment of money received with ten per cent interest could not object to recovery of interest at that rate because agreement was not in writing. *Walter v. Adams*, 138 Ark. 411, 211 S.W. 365 (1919).

### **Parol Evidence.**

Parol testimony held admissible. *Kyser v. T.M. Bragg & Sons*, 228 Ark. 578, 309 S.W.2d 198 (1958).

Ordinarily parol evidence is not admissible to vary the terms of a written contract, but there is an exception when such evidence is for the purpose of showing usury. *Heidelberg S. Sales Co. v. Tudor*, 229 Ark. 500, 316 S.W.2d 716 (1958).

### **Prepayment.**

Note bearing interest at highest rate for entire year was not invalidated by fact that money was not loaned until June if there was an agreement of the parties that when loan was closed the note should be reduced by a credit which would bring it within limits of lawful interest. *Scruggs v. Scottish-American Mtg. Co.*, 54 Ark. 566, 16 S.W. 563 (1891).

Involuntary prepayment of principal will make a contract usurious if it results in the interest exceeding the constitutional limitation. *Foster v. Universal C.I.T. Credit Corp.*, 231 Ark. 230, 330 S.W.2d 288 (1959).

A contract, otherwise legal, was not rendered usurious by the makers paying monthly payments in advance. *Green v. Mid-State Homes, Inc.*, 245 Ark. 866, 435 S.W.2d 436 (1968).

The taking of the highest legal rate of interest in advance amounts to usury, if the advance withholding of a one-year loan causes the interest rate to actually exceed the constitutional limitation in Ark. Const., Art. 19, § 13. *Fausett & Co. v. G & P Real Estate, Inc.*, 269 Ark. 481, 602 S.W.2d 669 (1980).

### **Presumptions.**

In the absence of proof of the laws of another state, they will not be presumed to be the same as of this state in regard to usury. *Grider v. Driver*, 46 Ark. 50 (1885).

Verbal contract entered into in another state to pay certain percentage rate on account is presumed valid. *Everton v. Day*, 66 Ark. 73, 48 S.W. 900 (1898).

There is no presumption that foreign loan contract is usurious. *Sawyer v. Dickson*, 66 Ark. 77, 48 S.W. 903 (1898).

Usury is not inferred if the opposite conclusion can be reached. *Leonhard v. Flood*, 68 Ark. 162, 56 S.W. 781 (1900); *Moore v. Owens*, 268 Ark. 324, 597 S.W.2d 65 (1980).

### **Property.**

Loan of money at highest lawful rate of interest, made under endorsement of a promise by borrower that he would make a valuable gift of personal property to lender, was usurious. *Hendrickson v. Godsey*, 54 Ark. 155, 15 S.W. 193 (1891).

Acceptance, in payment of interest on loan, of property which is known to be of greater value than the maximum legal rate of interest on loan renders the note usurious. *Sapp v. Cobb*, 60 Ark. 367, 30 S.W. 349 (1895).

### **Remedies.**

Where seller of automobile charged usurious interest on contract of sale and made no offer to remit excessive interest or to defend allegations when matter was brought to his attention by defense of usury and evidence showed that excessive interest was charged either because seller did not know how to figure interest or carelessly figured it, such charge was legally inexcusable and buyer was entitled to cancelation of the contract. *Holland v. Doan*, 228 Ark. 340, 307 S.W.2d 538 (1957).

There can be no recovery of money voluntarily paid on an account, where a usurious rate of interest was charged, except the recovery of the excessive interest. *Harris v. McCann*, 229 Ark. 972, 319 S.W.2d 832 (1959).

When a contract of sale is set aside for usury the purchaser is entitled to keep the property. *Universal C.I.T. Credit Corp. v. Hudgens*, 234 Ark. 668, 356 S.W.2d 658 (1962), rev'd, *Universal CIT Credit Corp. v. Hudgens*, 234 Ark. 1127, 356 S.W.2d 658 (Ark. 1962).

One who had pledged articles to a pawnbroker, contracting to pay a usurious charge on the loan, was entitled to replevin the articles pawned. *Miller v. Test*, 243 Ark. 694, 421 S.W.2d 345 (1967).

### **Service Charges, Fees, Etc.**

#### **—In General.**

Borrower may be required to pay for an abstract of title, for recording mortgage,

preparing papers, incidental fees, etc., without violating usury prohibition since those costs are not chargeable as interest. *Richardson v. Shattuck*, 57 Ark. 347, 21 S.W. 478 (1893); *Sidway v. Harris*, 66 Ark. 387, 50 S.W. 1002 (1899); *Matthews v. Georgia State Sav. Ass'n*, 132 Ark. 219, 200 S.W. 130 (1918).

Usury cannot be predicated upon the charge of a profit of maximum legal rate for interest to the cash price of goods sold on credit. *Starling v. Hamner*, 185 Ark. 930, 50 S.W.2d 612 (1932).

Service or other charges held to make contract usurious. *Public Loan Corp. v. Weaver*, 223 Ark. 902, 270 S.W.2d 888 (1954); *Kyser v. T.M. Bragg & Sons*, 228 Ark. 578, 309 S.W.2d 198 (1958); *Miller v. Test*, 243 Ark. 694, 421 S.W.2d 345 (1967); *First Nat'l Bank v. Nowlin*, 509 F.2d 872 (8th Cir. 1975); *Fausett & Co. v. G & P Real Estate, Inc.*, 269 Ark. 481, 602 S.W.2d 669 (1980).

When contract gives borrower no information about deferred charges being exacted by the lender, the trier of facts is justified in assuming, until convinced by proof to the contrary, that the difference between the principal of the loan and the face amount of the contract represents interest on the debt. *Jones v. Jones*, 227 Ark. 836, 301 S.W.2d 737 (1957).

Where contract for sale of merchandise includes some hidden or unitemized charge or other item with a meaningless label as a part of the carrying charges, the lender has the burden of explaining in detail such mysterious hidden charge or it will be considered as part of the interest. *Kyser v. T.M. Bragg & Sons*, 228 Ark. 578, 309 S.W.2d 198 (1958).

A provision for attorneys' fees, although void, does not per se render an otherwise valid contract usurious. *Pacific Indus., Inc. v. Mountain Inn, Inc.*, 232 F. Supp. 801 (W.D. Ark. 1964).

Finance charge or time price differential is an amount exacted for the forbearance or extension of time for the payment of the principal balance; therefore, it is interest, as contemplated by Arkansas Constitution and statutes concerning maximum interest charges. *Pacific Indus., Inc. v. Mountain Inn, Inc.*, 232 F. Supp. 801 (W.D. Ark. 1964).

#### —Bonus or Commission.

Where lender or agent receives a bonus and loan if for highest rate of interest, the

note is usurious. *Thompson v. Ingram*, 51 Ark. 546, 11 S.W. 881 (1889); *Humphrey v. McCauley*, 55 Ark. 143, 17 S.W. 713 (1891); *Dickey v. Phoenix Fin. Co.*, 193 Ark. 1145, 104 S.W.2d 806 (1937).

Commissions paid to agent of borrower by the borrower, form no part of the sum paid in determining interest. *Baird v. Millwood*, 51 Ark. 548, 11 S.W. 881 (1889); *May v. Flint*, 54 Ark. 573, 16 S.W. 575 (1891); *Holt v. Kirby*, 57 Ark. 251, 21 S.W. 432 (1893); *Sherwood v. Wilkins*, 65 Ark. 312, 45 S.W. 988 (1898); *Martin v. Adams*, 66 Ark. 10, 48 S.W. 494 (1898); *Johnson v. Shattuck*, 67 Ark. 159, 53 S.W. 888 (1899); *McDougall v. Hachmeister*, 184 Ark. 28, 41 S.W.2d 1088 (1931).

Loan held not to be usurious despite payment of bonus. *Hendrickson v. Godsey*, 54 Ark. 155, 15 S.W. 193 (1891).

A loan of money at the highest rate of interest is not rendered usurious by reason of exactions of commission by sub-agent employed by lender's agent without the lender's authority. *Scruggs v. Scottish-American Mtg. Co.*, 54 Ark. 566, 16 S.W. 563 (1891).

Bonus held to render loan usurious. *Jones v. Phillippe*, 135 Ark. 578, 206 S.W. 40 (1918); *Dickey v. Phoenix Fin. Co.*, 193 Ark. 1145, 104 S.W.2d 806 (1937).

#### —Insurance.

An agreement by a borrower to take out insurance on the property which secures the loan does not constitute usury in the absence of a showing that the policy was taken out as a cloak or device to evade the statutes. *Matthews v. Georgia State Sav. Ass'n*, 132 Ark. 219, 200 S.W. 130 (1918).

Where overcharge on premium on insurance policy in connection with sale of automobile was attributable to an honest mistake which was corrected, it was not a cloak for usury. *Griffin v. Murdock Acceptance Corp.*, 227 Ark. 1018, 303 S.W.2d 242 (1957).

Although amount listed as finance charge in instalment sale of automobile would have been usurious, where it was shown that such amount included actual premiums paid on insurance policies which were signed for by purchaser in separate agreement and that the finance charge was not usurious when such premiums were deducted, the lender sustained the burden of explaining the additional charge. *Universal C.I.T. Credit*

Corp. v. Lackey, 228 Ark. 101, 305 S.W.2d 858 (1957).

In conditional sales contract the signing of voluntary election to purchase credit life and personal accident insurance did not render the contract usurious. Lowrey v. General Contract Corp., 228 Ark. 685, 309 S.W.2d 736 (1958).

### **Taxes.**

Taxes do not bear interest except as specified by statute. Texarkana Water Co. v. State, 62 Ark. 188, 35 S.W. 788 (1896).

When conduct of conditional seller in not remitting sales tax to state did not create presumption of bad faith, the court will not infer that seller's lack of diligence in paying the tax due under Arkansas law was a subterfuge to collect charges in excess of the lawful interest rate. Pacific Indus., Inc. v. Mountain Inn, Inc., 232 F. Supp. 801 (W.D. Ark. 1964).

For usury purposes, collection by the conditional seller of an amount designated and labeled "sales tax," for which seller was unquestionably liable to the state of Arkansas, normally should not be computed as part of the interest or an exaction for forbearance. Pacific Indus., Inc. v. Mountain Inn, Inc., 232 F. Supp. 801 (W.D. Ark. 1964).

### **Usurious Contracts Generally.**

Where usurious interest is carried in a general account for which a note is given, it taints the whole transaction. Pickett v. Merchants Nat'l Bank, 32 Ark. 346 (1877).

Contract held to be usurious. White v. Friedlander, 35 Ark. 52 (1879); Daniels v. Johnson, 234 Ark. 315, 351 S.W.2d 853 (1961).

Contract held not to be usurious. Wallis & Bros. v. Lehman, 36 Ark. 569 (1880); Starling v. Hamner, 185 Ark. 930, 50 S.W.2d 612 (1932); Universal C.I.T. Credit Corp. v. Hudgens, 234 Ark. 668, 356 S.W.2d 658 (1962), rev'd, Universal CIT Credit Corp. v. Hudgens, 234 Ark. 1127, 356 S.W.2d 658 (Ark. 1962); Pacific Indus., Inc. v. Mountain Inn, Inc., 232 F. Supp. 801 (W.D. Ark. 1964).

There is no usury in a building and loan company contract in the usual form. Reeve v. Ladies Bldg. Ass'n, 56 Ark. 335, 19 S.W. 917 (1892); Taylor v. Van Buren Bldg. & Loan Ass'n, 56 Ark. 340, 19 S.W. 918 (1892); Black v. Tompkins, 63 Ark. 502, 39 S.W. 553 (1897); Farmers' Sav. &

Bldg. & Loan Ass'n v. Ferguson, 69 Ark. 352, 63 S.W. 797 (1901).

There can be no usury in a contract which expressly provides that no unlawful interest shall be paid. Taylor v. Van Buren Bldg. & Loan Ass'n, 56 Ark. 340, 19 S.W. 918 (1892).

Where interest at a higher rate than the maximum legal rate was charged on an account, the account was void as to the items as to which the usurious rate of interest was charged. Hall Bros. Co. v. Johnson, 111 Ark. 593, 164 S.W. 278 (1914).

Test whether a contract is usurious is whether the total amount payable by borrower exceeds principal received plus maximum legal rate of interest. McDougall v. Hachmeister, 184 Ark. 28, 41 S.W.2d 1088 (1931).

To constitute usury, there must be an agreement requiring the borrower to pay and entitling the lender to receive a higher rate of interest than the maximum legal rate. Starling v. Hamner, 185 Ark. 930, 50 S.W.2d 612 (1932); Moore v. Owens, 268 Ark. 324, 597 S.W.2d 65 (1980).

Rule that contracts financing sale of merchandise on credit could be attacked for usury where return was more than maximum legal interest rate was not limited to transactions where a loan of money was involved but applied also between the seller and buyer where a credit sale is involved. Sloan v. Sears, Roebuck & Co., 228 Ark. 464, 308 S.W.2d 802 (1957).

A conditional sales contract falls within constitutional and statutory provisions of Arkansas relating to usury. Pacific Indus., Inc. v. Mountain Inn, Inc., 232 F. Supp. 801 (W.D. Ark. 1964).

A note, with the exception of a short term single payment note, that is usurious under state law is also usurious when made to a national bank. First Nat'l Bank v. Nowlin, 509 F.2d 872 (8th Cir. 1975).

Where a lender violated Arkansas' usury laws, the lender's surety became liable under a bond to satisfy a judgment that a customer won against the lender because the bond's language was not limited to violations of the Check-Cashers Act, §§ 23-52-101 — 23-52-117. Ark. Bd. of Collection Agencies v. McGhee, 372 Ark. 136, 271 S.W.3d 512 (2008).

**Cited:** Rector v. Collins, 46 Ark. 167 (1885); Garland County v. Hot Spring County, 68 Ark. 83, 56 S.W. 636 (1900);

*Crisco v. Murdock Acceptance Corp.*, 222 Ark. 127, 258 S.W.2d 551 (1953); *Smith v. Eason*, 223 Ark. 747, 268 S.W.2d 389 (1954); *Rebsamen Motors, Inc. v. Morris*, 229 Ark. 483, 317 S.W.2d 141 (1958); *United States Manganese Corp. v. Merrill*

*Lynch, Pierce, Fenner & Smith, Inc.*, 576 F.2d 153 (8th Cir. 1978); *Barnett v. Borg-Warner Acceptance Corp.*, 488 F. Supp. 786 (E.D. Ark. 1980); *Aetna Life Ins. Co. v. Great Nat'l Corp.*, 818 F.2d 19 (8th Cir. 1987).

#### 4-57-105. Usurious interest prohibited.

No person or corporation shall, directly or indirectly, take or receive in money, goods, things in action, or any other valuable thing, any greater sum or value for the loan or forbearance of money or goods, things in action, or any other valuable thing, than is prescribed in § 4-57-104.

**History.** Acts 1875, No. 56, § 2, p. 145; C. & M. Dig., § 7354; Pope's Dig., § 9393; A.S.A. 1947, § 68-603.

### RESEARCH REFERENCES

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Rights in Credit Transactions, 33 Ark. L. Rev. 490.

### CASE NOTES

#### ANALYSIS

Applicability.  
Attorney's Fees.  
Preemption.  
Service Charges, Etc.  
Taxes.

#### Applicability.

A conditional sales contract falls within constitutional and statutory provisions relating to usury. *Pacific Indus., Inc. v. Mountain Inn, Inc.*, 232 F. Supp. 801 (W.D. Ark. 1964).

Where a lender violated Arkansas' usury laws, the lender's surety became liable under a bond to satisfy a judgment that a customer won against the lender because the bond's language was not limited to violations of the Check-Cashers Act, §§ 23-52-101 — 23-52-117 [repealed]. *Ark. Bd. of Collection Agencies v. McGhee*, 372 Ark. 136, 271 S.W.3d 512 (2008).

#### Attorney's Fees.

A provision for attorney's fees, although void, does not per se render an otherwise valid contract usurious. *Pacific Indus., Inc. v. Mountain Inn, Inc.*, 232 F. Supp. 801 (W.D. Ark. 1964).

#### Preemption.

In view of fact that Congress had constitutional authority under the commerce clause to set the maximum interest rate that could be charged by FDIC-insured state banks, federal legislation, preempted state usury laws and, a promissory note executed and delivered to a state banking association by defendant corporation which agreed to pay interest at a rate allowable under the federal legislation but greater than the state's maximum legal rate was not usurious. *Stephens Sec. Bank v. Eppivic Corp.*, 411 F. Supp. 61 (W.D. Ark. 1976).

#### Service Charges, Etc.

Finance charge or time price differential is an amount exacted for the forbearance or extension of time for the payment of the principal balance; therefore, it is interest, as contemplated by Arkansas Constitution and statutes concerning maximum interest charges. *Pacific Indus., Inc. v. Mountain Inn, Inc.*, 232 F. Supp. 801 (W.D. Ark. 1964).

Service or other charge held to render agreement usurious. *Pacific Indus., Inc. v. Mountain Inn, Inc.*, 232 F. Supp. 801 (W.D. Ark. 1964); *Miller v. Test*, 243 Ark. 694, 421 S.W.2d 345 (1967); *Fausett & Co.*

v. G & P Real Estate, Inc., 269 Ark. 481, 602 S.W.2d 669 (1980).

#### **Taxes.**

When conduct of conditional seller in not remitting sales tax to state Revenue Department (now Department of Finance and Administration) did not create presumption of bad faith, the court will not infer that seller's lack of diligence in paying the tax due under Arkansas law was a subterfuge to collect charges in excess of the lawful interest rate. *Pacific Indus., Inc. v. Mountain Inn, Inc.*, 232 F. Supp. 801 (W.D. Ark. 1964).

For usury purposes, collection by the conditional seller of an amount designated and labeled "sales tax," for which seller was unquestionably liable to the state of Arkansas, normally should not be computed as part of the interest or an exaction for forbearance. *Pacific Indus., Inc. v. Mountain Inn, Inc.*, 232 F. Supp. 801 (W.D. Ark. 1964).

**Cited:** *Barnett v. Borg-Warner Acceptance Corp.*, 488 F. Supp. 786 (E.D. Ark. 1980).

### **4-57-106. [Repealed.]**

**Publisher's Notes.** This section, concerning usurious bonds, bills, conveyances, etc. being void, was repealed by Acts 2005, No. 1962, § 3, due its having been held repealed by implication in *Henslee v. Madison Guar. Sav. & Loan Ass'n*,

297 Ark. 183, 760 S.W.2d 842 (1989). The section was derived from Acts 1875, No. 56, § 3, p. 145; C. & M. Dig., § 7363; Pope's Dig., § 9402; A.S.A. 1947, § 68-608.

### **4-57-107. [Repealed.]**

**Publisher's Notes.** This section, concerning usurious contracts, liens, and conveyances, was repealed by Acts 2005, No. 1962, § 4, due to its having been held repealed by implication in *Henslee v. Madison Guar. Sav. & Loan Ass'n*, 297

Ark. 183, 760 S.W.2d 842 (1989). The section was derived from Acts 1887, No. 39, §§ 1-3, p. 50; C. & M. Dig., §§ 7364-7366; Pope's Dig., §§ 9403-9405; A.S.A. 1947, §§ 68-609 — 68-611.

### **4-57-108. Usurious consumer loans or credit sales — Award of attorney's fees.**

(a) Any person who prevails in circuit court in litigation alleging a consumer loan or credit sale to be willfully usurious under Arkansas Constitution, Amendment 60, shall be awarded reasonable attorney's fees.

(b) This section shall be applicable to all actions pending on June 28, 1985, or instituted thereafter.

(c) For purposes of this section, the term "person" means any individual, partnership, corporation, financial institution, or other legal entity.

**History.** Acts 1985, No. 245, § 1; A.S.A. 1947, § 68-614.

cuit courts, Ark. Const., Amend. 80, §§ 6, 19.

**Cross References.** Jurisdiction of cir-

## RESEARCH REFERENCES

**U. Ark. Little Rock L.J.** Legislative Survey, Civil Procedure, 8 U. Ark. Little Rock L.J. 555.

## CASE NOTES

### In General.

Trial court erred by denying attorneys' fees to a party that prevailed in an action where the loan at issue was determined to be usurious under Ark. Const. art. 19,

§ 13 [repealed] because, pursuant to this section, a fee award was mandatory in that case. *Smith v. Eisen*, 97 Ark. App. 130, 245 S.W.3d 160 (2006).

## CHAPTER 58

## ASSIGNMENTS

### SECTION.

- 4-58-101. Remedies unaltered by chapter.
- 4-58-102. Assignment of certain instruments authorized.
- 4-58-103. Consideration.
- 4-58-104. Date of assignment.
- 4-58-105. Completion of assignments — Rights and remedies of debtor and subsequent assignees.
- 4-58-106. Powers of assignor after assignment.

### SECTION.

- 4-58-107. Vendor's lien inures to benefit of assignee.
- 4-58-108. Liability of assignors upon non-payment or protest of instrument.
- 4-58-109. Proof of assignment — Pleadings.
- 4-58-110. Recovery by plaintiff.

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## RESEARCH REFERENCES

**ALR.** Assignability of proceeds of claim for personal injury or death. 33 A.L.R.4th 82.

Malpractice by attorney: assignability of claim for. 40 A.L.R.4th 684.

Applicability of Article 9 of Uniform Commercial Code to assignment of rights under real-estate sales contracts, lease agreements, or mortgage as collateral for separate transaction. 76 A.L.R.4th 765.

Enforceability, by purchaser or successor of business, of covenant not to compete entered into by predecessor and its employees. 12 A.L.R.5th 847.

**Am. Jur.** 6 Am. Jur. 2d, Assign., § 1 et seq.

**Ark. L. Rev.** Transmissibility of Certain Contingent Future Interests, 5 Ark. L. Rev. 111.

**C.J.S.** 6A C.J.S., Assign., § 1 et seq.

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### 4-58-101. Remedies unaltered by chapter.

Nothing contained in this chapter shall change the nature of the defense or prevent the allowance of discounts or offsets, either in law or equity, that any defendant may have against the original assignor previous to the assignment or against the plaintiff or assignee after the assignment.

**History.** Rev. Stat., ch. 11, § 3; C. & M. Dig., § 477; Pope's Dig., § 514; A.S.A. 1947, § 68-803.

**Cross References.** Note for gambling debt, assignment does not affect defense, § 16-118-103.

## CASE NOTES

### ANALYSIS

In General.  
Consideration.  
Discounts or Set-Offs.

#### In General.

The maker of a note is not, by an assignment, deprived of any defense which he had as against the assignor previous to the assignment. *Tatum v. Kelley*, 25 Ark. 209 (1868); *Union Trust Co. v. Pocahontas Special School Dist.*, 189 Ark. 1019, 76 S.W.2d 60 (1934).

#### Consideration.

The maker has the same right to set up the defense of illegality of the consideration against the assignee as he had against the payee, where it did not appear that note had been assigned before maturity. *Ruddell v. Landers*, 25 Ark. 238 (1868).

Where note was executed as a compro-

mise and part settlement of decree but thereafter decree was set aside, assignee of note obtaining note before decree was set aside was not prejudiced by the setting aside of the decree. *Sayre v. Thompson*, 28 Ark. 336 (1873).

#### Discounts or Set-Offs.

Assignee of an open account takes subject to all rights of set-off held by debtor against assignor. *Jones v. Model Laundry*, 180 Ark. 616, 22 S.W.2d 19 (1929).

Where a contractor makes an assignment to a subcontractor of debts due it from a city, the city can assert any discounts or set-offs it has against the contractor, in a suit by the subcontractor against the city. *Robinson v. City of Pine Bluff*, 224 Ark. 791, 276 S.W.2d 419 (1955).

**Cited:** *Jones v. State*, 40 Ark. 344 (1883); *Roberts v. Feltman*, 55 Ark. App. 142, 932 S.W.2d 781 (1996).

## 4-58-102. Assignment of certain instruments authorized.

All bonds, bills, notes, agreements, and contracts in writing for the payment of money or property, or for both money and property, shall be assignable.

**History.** Rev. Stat., ch. 11, § 1; C. & M. Dig., § 475; Pope's Dig., § 512; A.S.A. 1947, § 68-801.

## RESEARCH REFERENCES

**U. Ark. Little Rock L.J.** Arkansas Law Survey, Looney, Business Law, 8 U. Ark. Little Rock L.J. 99.

## CASE NOTES

### ANALYSIS

Construction.  
Applicability.  
Acknowledgments of Debt.  
Bill of Lading.  
Causes of Action.

Contracts.  
Escrow Agreements.  
Garnishment of Proceeds.  
Open Accounts.  
Promissory Notes.  
Warrants.  
Writing Required.

**Construction.**

There was not an irreconcilable conflict between § 23-85-114(b)(2) and this section and the insurance code provisions did not repeal the general law on assignments. *American Medical Int'l, Inc. v. Arkansas Blue Cross & Blue Shield*, 299 Ark. 514, 773 S.W.2d 831 (1989).

**Applicability.**

The Employee Retirement Income Security Act of 1974 (ERISA) does not preempt the Arkansas assignment statute, as the assignment statute applies to welfare benefits payable under ERISA plans. *Arkansas Blue Cross & Blue Shield v. St. Mary's Hosp.*, 947 F.2d 1341 (8th Cir. 1991), cert. denied, 504 U.S. 957, 112 S. Ct. 2305 (1992).

**Acknowledgments of Debt.**

A written acknowledgment of a debt, signed by the maker, is assignable, and may be sued on by the holder, without making his assignor a party, although there is no written assignment upon it. *St. Louis, I. M. & S. Ry. v. Camden Bank*, 47 Ark. 541, 1 S.W. 704 (1886).

**Bill of Lading.**

Bill of lading was assignable. *Price v. New York, C. & S. L. R. Co.*, 175 Ark. 688, 300 S.W. 373 (1927).

**Causes of Action.**

In an action by the insurer against the person whose negligence is alleged to have caused a fire loss which the insurer paid, the insured was a necessary party as the cause of action was not assignable at law. *National Fire Ins. Co. v. Pettit-Galloway Co.*, 157 Ark. 333, 248 S.W. 262 (1923).

**Contracts.**

A contract for the sale of chattels which involves no personal relation of confidence between the parties and no personal skill or science may be assigned. *Roberts Cotton Oil Co. v. F.E. Morse & Co.*, 97 Ark. 513, 135 S.W. 334 (1911).

Where purchaser of a mercantile business, as part of the price agreed to pay certain of seller's debts, the purchaser was liable to the assignee of seller's creditor. *National Trust & Credit Co. v. Polk*, 123 Ark. 24, 183 S.W. 195 (1916).

An executory contract for the purchase of land is assignable. *Corcorren v. Sharum*, 141 Ark. 572, 217 S.W. 803 (1920).

Contract of sale providing for retention of deed and abstract conditional on making of periodic payments can be assigned by vendor. *Lancaster v. Robinson*, 221 Ark. 767, 256 S.W.2d 330 (1953).

A letter stating that if a contractor does not pay a subcontractor, he can deliver the letter to a city commission as an assignment of money due the contractor under a valid contract, constitutes an equitable assignment with or without the debtors acceptance, since no particular words are necessary and since it is the transfer of an interest under the assignor's express intention. *Robinson v. City of Pine Bluff*, 224 Ark. 791, 276 S.W.2d 419 (1955).

Principal stockholder who in contract of sale agreed to pay all liabilities of corporation that were then outstanding, assumed corporate liabilities, and was responsible for a claim that existed under a certain contract, and where the corporation discharged obligation to the creditor's satisfaction, the principal stockholder had received the benefit of the transaction and was required to satisfy the record of the mortgage indebtedness. *Harris v. Helena Rice Drier, Inc.*, 227 Ark. 205, 297 S.W.2d 652 (1957).

**Escrow Agreements.**

Where the original buyer of corporate stock under escrow agreement did not assign to assignee any more than he was entitled to under the escrow agreement, i.e., the right to pay off the price of the stock in annual installments, such assignment was valid and upon fulfillment of the condition, the assignee would then be entitled to whatever rights the assignor would have had upon the fulfillment of the condition. *Estate of Ingram v. Kochtitzky*, 282 Ark. 203, 668 S.W.2d 1 (1984), rehearing denied, 282 Ark. 206a, 671 S.W.2d 162 (1984).

**Garnishment of Proceeds.**

Where debtor-employee had assigned the proceeds of a service contract to a bank, the trial court did not err in quashing a garnishment on the employer and paying the money to the bank. *Watkins v. Hadamek*, 48 Ark. App. 78, 892 S.W.2d 515 (1994).

**Open Accounts.**

An open account is not an assignable instrument. *St. Louis, I. M. & S. Ry. v. Camden Bank*, 47 Ark. 541, 1 S.W. 704

(1886); *Oberste Bros. v. Crabtree*, 175 Ark. 107, 299 S.W. 6 (1927); *Maryland Cas. Co. v. People's Lumber & Supply Co.*, 181 Ark. 761, 27 S.W.2d 1023 (1930).

#### **Promissory Notes.**

Promissory note is assignable. *Higginbotham v. Ritter*, 200 Ark. 376, 139 S.W.2d 27 (1940).

Although debtor executed a back-dated assignment purporting to convey all of his right, title, and interest in a promissory note to his parents, their interest in its proceeds was superior to that of debtor's creditors under this section and § 4-58-105, where the parties to the assignment did not intend an absolute transfer of the note, but merely the creation of a security

interest. *Luker v. Reeves*, 65 F.3d 670 (8th Cir. 1995).

#### **Warrants.**

Where a county court made an order of allowance and issued warrants based thereon, the warrants were assignable and the assignee could appeal from a subsequent order of the county court canceling the warrants as improperly issued. *Woodruff County v. Road Improv. Dist.*, 159 Ark. 374, 252 S.W. 930 (1923).

#### **Writing Required.**

Only agreements or contracts in writing are assignable. *Chicago, R.I. & P. Ry. v. Cobbs*, 151 Ark. 207, 235 S.W. 995 (1921).

**Cited:** *Estate of Ingram v. Kochtitzky*, 282 Ark. 206a, 671 S.W.2d 162 (1984).

### **4-58-103. Consideration.**

It shall not be necessary for any assignee to set forth the consideration of any of the assignments on any such assigned paper.

**History.** Rev. Stat., ch. 11, § 5; C. & M. Dig., § 480; Pope's Dig., § 517; A.S.A. 1947, § 68-807.

### **CASE NOTES**

#### **Pleading.**

It is not necessary that the assignee set forth the consideration for the assignment in his motion to be made sole plaintiff.

*Higginbotham v. Ritter*, 200 Ark. 376, 139 S.W.2d 27 (1940).

**Cited:** *Smith v. National Cashflow Sys.*, 309 Ark. 101, 827 S.W.2d 146 (1992).

### **4-58-104. Date of assignment.**

(a) All assignments of any instruments of writing shall bear the date upon which the assignment was made.

(b) All blank assignments shall be taken to have been made on the day most to the advantage of the defendant.

**History.** Rev. Stat., ch. 11, §§ 6, 7; C. & M. Dig., §§ 481, 482; Pope's Dig., §§ 518, 519; A.S.A. 1947, §§ 68-808, 68-809.

### **CASE NOTES**

#### **Blank Assignments.**

Subsection (b) applies only where there is no evidence as to date of assignment. *Trieber v. Commercial Bank*, 31 Ark. 128 (1876). See also *Trader v. Chidester*, 41 Ark. 242 (1883).

The rule of subsection (b) may be overcome by proof that the assignment was made before maturity of the note. *Tabor v. Merchants Nat'l Bank*, 48 Ark. 454, 3 S.W. 805 (1886).

**4-58-105. Completion of assignments — Rights and remedies of debtor and subsequent assignees.**

(a) Every written assignment made in good faith, whether in the nature of a sale, pledge, or other transfer, or on account receivable or any moneys due or to become due on an open account or on a contract, except for wages and salaries, all of which shall be hereinafter referred to as “account”, with or without the giving of notice of the assignment to the debtor, shall be valid and complete at the time of the making of the assignment and shall be deemed to have been fully perfected at that time.

(b)(1) After an assignment made in good faith is complete, no bona fide purchaser from the assignor, no creditor of the assignor, and no other assignee or transferee of the assignor in any event shall have or be deemed to have acquired any right or interest in the account so assigned or transferred or in the proceeds thereof or in any obligation substituted therefor, superior to the rights and interest therein of the assignee.

(2) In any case where, acting without knowledge of the assignment or transfer, the debtor in good faith pays all or part of such account to the assignor or to the creditor, subsequent purchaser, or other assignee and transferee, all payments so made shall be acquittance to the debtor to the extent thereof, and the assignor, creditor, subsequent purchaser, or other assignee and transferee shall be a trustee of any sums so paid and shall be accountable and liable to the prior assignee thereof.

(3) However, any defense of the debtor against any account so assigned or transferred shall be good as against any subsequent purchaser or other assignee and transferee.

**History.** Acts 1945, No. 118, § 1; A.S.A. 1947, § 68-805.

**CASE NOTES****ANALYSIS**

Applicability.

Security Interest Created.

Sureties.

Unauthorized Practice of Law.

**Applicability.**

This section is not intended to apply to assignments of rent. A lease is not a contract but a conveyance, and rent is not a mere income stream, and thus personalty, but an interest in realty subject to all the rules of conveyancing. *First Fed. Sav. v. City Nat'l Bank*, 87 B.R. 565 (W.D. Ark. 1988).

**Security Interest Created.**

Although debtor executed a back-dated assignment purporting to convey all of his right, title, and interest in a promissory note to his parents, their interest in its proceeds was superior to that of debtor's creditors under this section and § 4-58-102, where the parties to the assignment did not intend an absolute transfer of the note, but merely the creation of a security interest. *Luker v. Reeves*, 65 F.3d 670 (8th Cir. 1995).

**Sureties.**

The rights of a surety to funds in the hands of the owner, when a contractor

defaults, are superior to the rights of an assignee of the contractor, as the assignee stands in the contractor's position. *Exchange Bank & Trust Co. v. Texarkana School Dist.*, 227 Ark. 759, 301 S.W.2d 453 (1957).

**Unauthorized Practice of Law.**

If an assignee was engaged in the unauthorized practice of law by bringing an

action on the assigned list, it would not extinguish or invalidate a just debt. *Smith v. National Cashflow Sys.*, 309 Ark. 101, 827 S.W.2d 146 (1992).

**Cited:** *Newton v. Merchants & Farmers Bank*, 11 Ark. App. 167, 668 S.W.2d 51 (1984).

**4-58-106. Powers of assignor after assignment.**

No assignor shall be able to release any part of the consideration of the instrument by him or her assigned after the assignment thereof.

**History.** Rev. Stat., ch. 11, § 8; C. & M. Dig., § 483; Pope's Dig., § 520; A.S.A. 1947, § 68-810.

**CASE NOTES**

**Cited:** *Mammoth Vein Coal Co. v. Bishop*, 113 Ark. 585, 168 S.W. 1086 (1914).

**4-58-107. Vendor's lien inures to benefit of assignee.**

The lien or equity held or possessed by the vendor of any real estate for the sale of the real estate shall inure to the benefit of any assignee of the notes or obligations given for the purchase money of the real estate, and the lien or equity shall be assignable and payable by endorsement or otherwise, in the hands of the assignee, and any such assignee may maintain an action or suit to enforce the lien or equity if the lien or equity is expressed upon or appears from the face of the deed of conveyance.

**History.** Civil Code, § 28; Acts 1873, § 476; Pope's Dig., § 513; A.S.A. 1947, No. 88, § 1[28], p. 213; C. & M. Dig., § 68-802.

**CASE NOTES**

**ANALYSIS**

Applicability.  
Assignee's Rights.  
Bona Fide Purchasers.  
Mortgages.

**Applicability.**

This section only applies to assignments made after the passage of the Civil Code.

*Campbell v. Rankin*, 28 Ark. 401 (1873).

**Assignee's Rights.**

When it appeared on the face of the deed that the land was sold on time and notes were given for the purchase money, the vendor's lien passed to his assignee of the notes. *Stephens v. Anthony*, 37 Ark. 571 (1881); *Beard v. Bank of Osceola*, 126 Ark. 420, 190 S.W. 849 (1916).

**Bona Fide Purchasers.**

A vendor's lien reserved in a deed as security for the purchase notes of land is analogous to a mortgage and passes with the transfer of the notes to a bona fide purchaser freed from any defenses which the grantee had against the grantor. *Pullen v. Ward*, 60 Ark. 90, 28 S.W. 1084 (1894); *Fullerton v. Storthz*, 182 Ark. 751, 33 S.W.2d 714 (1930).

Where a purchaser of land gave a series of negotiable notes in payment therefor and deed was recorded and recited the retention of a vendor's lien to secure payment of the notes, an innocent purchaser of the notes was entitled to enforce the lien retained for their payment and the right was not defeated by a subsequent reconveyance by the buyer to the seller. *Hebert v. Fellheimer*, 115 Ark. 366, 171 S.W. 144 (1914).

Where a bank took certain notes reciting a vendor's lien as collateral security for a note, the maker of the note, defaulted

in payment, the bank was an innocent purchaser entitled to a foreclosure of the vendor's lien as against a judgment creditor of the maker of note who had secured a sale of the property on execution. *Harri-son v. Caddo Valley Bank*, 128 Ark. 462, 194 S.W. 854 (1917).

An endorsement of a vendor's lien "without recourse" to a bona fide purchaser does not release the lien. *Hankins v. Merchants & Planters Bank*, 161 Ark. 221, 255 S.W. 916 (1923).

**Mortgages.**

Where agreement was to take mortgage instead of retaining vendor's lien, although mortgage was never issued, the vendor or his assignee would have same rights as if mortgage had been issued. *Richardson & May v. Hamlett*, 33 Ark. 237 (1878).

**Cited:** *Campbell v. Rankin*, 28 Ark. 401 (1873); *Talieferro v. Barnett*, 37 Ark. 511 (1881).

**4-58-108. Liability of assignors upon nonpayment or protest of instrument.**

All endorser or assignors of any instrument in writing assignable by law for the payment of money alone, on receiving due notice of the nonpayment or protest of any endorsed or assigned instrument in writing, shall be equally liable with the maker, obligor, or payee of the instrument, and may be sued for the same at the same time with the maker, obligor, or payee thereof, or may be sued separately.

**History.** Rev. Stat., ch. 11, § 9; C. & M. Dig., § 484; Pope's Dig., § 521; A.S.A. 1947, § 68-811.

**CASE NOTES****ANALYSIS**

**Applicability.**  
**Waiver.**

**Applicability.**

This section is expressly limited to instruments for the payment of money alone. *Jones v. State*, 40 Ark. 344 (1883).

**Waiver.**

Where promissory note contains an express waiver of notice, this section would

apply although no notice is given and maker may be sued with endorser in county of endorser's residence. *Gibson v. Talley*, 206 Ark. 1, 174 S.W.2d 551 (1943).

Waiver of notice and protest accompanied by an unqualified endorsement renders the endorser equally liable to the holder of the note. *Haley v. Greenhaw*, 235 Ark. 481, 360 S.W.2d 753 (1962).

**Cited:** *Jones v. State*, 40 Ark. 344 (1883); *Barr v. Cockrill*, 224 Ark. 570, 275 S.W.2d 6 (1955).

### 4-58-109. Proof of assignment — Pleadings.

The assignee of any instrument in writing made assignable by law, on bringing suit on any assigned paper, shall not be required to prove the assignment unless the defendant annexes to his or her answer an affidavit denying the assignment and stating in the affidavit that he or she verily believes that one (1) or more of the assignments on the instrument of writing was forged.

**History.** Rev. Stat., ch. 11, § 4; C. & M. Dig., § 479; Pope's Dig., § 516; A.S.A. 1947, § 68-806.

### CASE NOTES

#### ANALYSIS

In General.  
Applicability.

#### In General.

An assignment need not be proved unless denied. *Winer v. Bank of Blytheville*, 89 Ark. 435, 117 S.W. 232 (1909); *Webb v. Alma Cash Store*, 160 Ark. 290, 254 S.W. 670 (1923).

#### Applicability.

This section applies only to assignments in writing. *School-District v. Reeve*, 56 Ark. 68, 19 S.W. 106 (1892).

This section only applies if written documentation of an assignment has been produced by the plaintiff. *Beal Bank v. Thornton*, 70 Ark. App. 336, 19 S.W.3d 48 (2000).

**Cited:** *Smith v. National Cashflow Sys.*, 309 Ark. 101, 827 S.W.2d 146 (1992).

### 4-58-110. Recovery by plaintiff.

The plaintiff in the several actions shall collect only the amount of his or her demand, with interest due thereon, and the costs on only one (1) of the actions.

**History.** Rev. Stat., ch. 11, § 10; C. & M. Dig., § 485; Pope's Dig., § 522; A.S.A. 1947, § 68-812.

## CHAPTER 59

## FRAUD

### SUBCHAPTER.

1. STATUTE OF FRAUDS.
2. FRAUDULENT TRANSFERS.
3. BILLS OF LADING.
4. WAREHOUSE RECEIPTS.
5. FACTORING OF FINANCIAL TRANSACTION CARD RECORDS OF SALE.

### SUBCHAPTER 1 — STATUTE OF FRAUDS

#### SECTION.

4-59-101. Contracts, agreements, or promises required to be in writing.

#### SECTION.

4-59-102. Leases, estates, etc.  
4-59-103. Trusts or confidences.

**Publisher's Notes.** For Commentary regarding the Uniform Fraudulent Transfer Act, see Commentaries Volume A.

Commentary regarding the Uniform Warehouse Receipts Act, see Commentaries Volume A.

**Effective Dates.** Acts 1989, No. 530, § 4: Mar. 14, 1989. Emergency clause provided: "It is hereby found and determined that this Act protects the public and lenders from fraud and misunderstandings

related to credit transactions. Therefore, in order to insure that the State possesses adequate authority under this Act to protect the citizens of the State of Arkansas from fraud and misunderstandings related to credit transactions, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

## RESEARCH REFERENCES

**ALR.** Promise by one other than principal to indemnify one agreeing to become surety or a guarantor as within statute of frauds. 13 A.L.R.4th 1153.

Enforceability, by landowner, of subdivision developer's oral promise to construct or improve roads. 41 A.L.R.4th 573.

Sufficiency of showing, in establishing boundary by parol agreement, that boundary was uncertain or in dispute before agreement. 74 A.L.R.4th 132.

Applicability of Statute of Frauds to promise to pay for legal services furnished to another. 84 A.L.R.4th 994.

Enforceability of contract to share winnings from legal lottery ticket. 90 A.L.R.4th 784.

**Am. Jur.** 72 Am. Jur. 2d, Stat. of Frauds, § 1 et seq.

**Ark. L. Rev.** Change of Possession and the Statute of Frauds, 1 Ark. L. Rev. 269.

Equity — Personal Services as Part Performance Under the Statute of Frauds, 3 Ark. L. Rev. 468.

Contracts — Executed Agreements Under the Statute of Frauds, 4 Ark. L. Rev. 225.

Drafting Instruments for Purchase and Conveyancing of Land, 13 Ark. L. Rev. 26.

Wills: Oral Agreement for Joint or Mutual Wills and the Statute of Frauds, 22 Ark. L. Rev. 398.

Contents of Writings, Recordings and Photographs, 27 Ark. L. Rev. 357.

Looney, Legal and Economic Considerations in Drafting Arkansas Farm Leases, 35 Ark. L. Rev. 395.

**C.J.S.** 37 C.J.S., Stat. of Frauds, § 2 et seq.

## 4-59-101. Contracts, agreements, or promises required to be in writing.

(a) Unless the agreement, promise, or contract, or some memorandum or note thereof, upon which an action is brought is made in writing and signed by the party to be charged therewith, or signed by some other person properly authorized by the person sought to be charged, no action shall be brought to charge any:

(1) Executor or administrator, upon any special promise, to answer for any debt or damage out of his or her own estate;

(2) Person, upon any special promise, to answer for the debt, default, or miscarriage of another;

(3) Person upon an agreement made in consideration of marriage;

(4) Person upon any contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning them;

(5) Person upon any lease of lands, tenements, or hereditaments for a longer term than one (1) year;

(6) Person upon any contract, promise, or agreement that is not to be performed within one (1) year from the making of the contract, promise, or agreement.

(b) No promise to pay a debt or obligation which has been discharged in bankruptcy shall be valid unless the promise is in writing.

(c) No action may be maintained to charge any person upon any promise made after full age to pay any debt contracted during infancy, unless the promise or ratification is made by some writing signed by the party to be charged with the promise or ratification.

(d)(1) No action may be maintained by or against any person or entity on any agreement to extend credit or to renew or modify existing credit in an amount greater than ten thousand dollars (\$10,000) or to make any other accommodation relating to such credit, unless the agreement is in writing and is signed by the party to be charged with the agreement, or the duly authorized agent of such party.

(2) For the purpose of this section:

(A) "Agreement" means any agreement, contract, promise, undertaking, or commitment, or any modification thereof; and

(B) "Credit" means the loaning of money, the right granted to defer payment of a debt, or to incur debt and defer its payment.

(3) However, nothing in this section shall in any way limit recovery of moneys or collateral which represents or relates to credit actually extended.

**History.** Rev. Stat., ch. 30, § 1; Rev. Stat., ch. 91, § 34; Acts 1901, No. 169, § 1, p. 322; C. & M. Dig., §§ 4862, 4863, 4869; Pope's Dig., §§ 6059, 6060, 6066; A.S.A. 1947, §§ 38-101 — 38-103; Acts 1989, No. 530, § 1.

**Cross References.** Statute of frauds, Uniform Commercial Code, § 4-2-201 et seq.

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## CASE NOTES

### ANALYSIS

In General.  
Applicability.  
Agreement in Consideration of Marriage.

Buildings.  
Contracts Concerning Land.  
—In General.  
—Adverse Possession.  
—Agreements to Buy and Resell.

- Delivery of Deed or Title.
- Easements.
- Estoppel.
- Miscellaneous Contracts.
- Mortgages.
- Part Performance.
- Real Estate Agents.
- Recovery of Money or Property.
- Rescission.
- Specific Performance.
- Timber.
- Contract for Employment.
- Contracts Not Performed Within Year.
- Debts Contracted During Infancy.
- Debts Discharged in Bankruptcy.
- Lease for Longer Than a Year.
- Modification of Contracts.
- Partial or Full Performance.
- Actions.
- Possession.
- Pleadings.
- Promises to Answer for Debts of Another.
- Collateral or Original Obligations.
- Corporations.
- Debt of Another.
- Estoppel.
- Guaranty.
- Medical Services.
- Miscellaneous Agreements.
- New Consideration.
- Payment.
- Preexisting Debts.
- Promisor's Benefit.
- Supplies Furnished to Another.
- Proof.
- Ratification of Agent's Act.
- Unenforceable Agreements.
- Writing or Memorandum.
- In General.
- Extrinsic or Parol Evidence.
- Incorporation of Instruments.
- Sufficiency.

### **In General.**

This section will not be allowed to operate as an instrument of fraud either in permitting one guilty of fraud to shelter himself behind it or in allowing its use as a means of perpetrating a fraud. *Neil v. Neil*, 172 Ark. 381, 288 S.W. 890 (1926); *Bolin v. Drainage Dist.*, 206 Ark. 459, 176 S.W.2d 143 (1943).

Where business owners acknowledged in their depositions that the bank held a lien on the business inventory and assets, the \$20,000 insurance proceeds were from coverage of the business's inventory that was destroyed by fire, and that the prom-

issory note for the money that was borrowed from the bank was also individually guaranteed by the owners, the owners were obligated on the loan pursuant to either the promissory note or the guaranty agreement, and their payment of the insurance proceeds to the bank was not solely referable to the alleged oral contract and did not constitute partial performance to take the alleged oral agreement out of the statute of frauds. *Moore v. Wallace*, 90 Ark. App. 298, 205 S.W.3d 824 (2005).

### **Applicability.**

This section does not apply to contracts which may be completely performed on one side when nothing remains to be done during a period longer than one year, except for the payment of compensation. *Johnson v. Harrywell, Inc.*, 47 Ark. App. 61, 885 S.W.2d 25 (1994).

Where a cashier's check was issued for the amount of the loan from the lender to the borrower, and the borrower made partial payments on the loan through direct deposits to the lender's account, the appellate court held that the statute of frauds did not apply. *Cobb v. Leyendecker*, 89 Ark. App. 167, 200 S.W.3d 924 (2005).

### **Agreement in Consideration of Marriage.**

A marriage contract must be reduced to writing and acknowledged. *Galbreath, Stewart & Co. v. Cook*, 30 Ark. 417 (1875).

An oral marriage settlement entered into before marriage being reduced to writing, signed and acknowledged after marriage, followed by substantial part performance, is valid and enforceable after the husband's death against his administrator. *Sims v. Roberts*, 188 Ark. 1030, 68 S.W.2d 1001 (1934).

### **Buildings.**

Houses erected by a lumber company on leased land which, under written contract, were to remain the property of the company as trade fixtures, never became part of the realty but remained personal property and the only provision of the statute of frauds applicable thereto would be that which relates to the sale of chattels. *Cameron v. Robbins*, 141 Ark. 607, 218 S.W. 173 (1920).

Where the grantor of timber to a lumber company contracted in writing that houses erected on the grantor's land by

the company should belong to the grantor at the end of the period allowed for removal of the timber, and a subsequent verbal contract that buildings erected by the company on lands of a third person should also belong to the grantor was entered into, the part of the contract not in writing was one not within the statute of frauds. *Cameron v. Robbins*, 141 Ark. 607, 218 S.W. 173 (1920).

Statute of frauds did not apply to building contract nor prevent the recovery of an additional sum on account of alteration in the plans. *Petrie v. Spooner*, 145 Ark. 138, 223 S.W. 383 (1920).

### Contracts Concerning Land.

To take an oral contract out of the statute of frauds under subdivision (a)(5) of this section, the making of the oral contract and its performance had to be proven by clear and convincing evidence; the trial court was not clearly erroneous in finding that all of the terms of the lease claimed in this case had not been proven by clear and convincing evidence. *Grisanti v. Zanone*, 2009 Ark. App. 545, 336 S.W.3d 886 (2009).

When a party alleged the existence of a constructive trust, the trial court may admit parol evidence of an oral promise to determine if a constructive trust should be imposed by a court of equity, and the statute of frauds does not apply. *Acuff v. Bumgarner*, 2009 Ark. App. 854, — S.W.3d — (2009), review denied, *Acuff v. Donald*, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 186 (Apr. 1, 2010).

Real estate prong of this section, the Arkansas Statute of Frauds, did not bar enforcement of an estoppel certificate signed by a seller, who held a first mortgage, where the certificate obligated the second mortgage holder to pay off the first mortgage in the event of the debtor's default in the bridge loan from the second mortgage holder, because the certificate did not convey or create an estate in land. *Shelton v. Kennedy Funding, Inc.*, 622 F.3d 943 (8th Cir. 2010).

While there was no written contract between the parties for the sale of land, there were other unresolved factual and legal issues as to whether an oral contract existed and if a partial payment was sufficient to take it out of the statute of frauds in subdivision (a)(4) of this section; therefore, summary judgment for the buy-

ers was inappropriate. *Vicentic v. Bishop*, 2011 Ark. App. 149, — S.W.3d — (2011).

### —In General.

A mere parol agreement by the purchaser of land at execution sale to reconvey the land to the execution defendants upon their reimbursing him for expenses incurred is void within the statute of frauds unless there is established an element of positive fraud whereby the title was wrongfully acquired. *Eason v. Wheeler*, 167 Ark. 320, 268 S.W. 29 (1925).

An oral agreement for the partition of lands including the right of one party to use a private road across another's land is not within the statute of frauds. *Neil v. Neil*, 172 Ark. 381, 288 S.W. 890 (1926).

Oral contract for sale of realty is barred by statute of frauds unless there is convincing evidence both in the making of the contract and the performance of the contract. *Hudspeth v. Thomas*, 214 Ark. 347, 216 S.W.2d 389 (1949); *Pfeifer v. Raper*, 253 Ark. 438, 486 S.W.2d 524 (1972).

Contracts in violation of subdivision (a)(4) are merely unenforceable, but not void. *Betnar v. Rose*, 259 Ark. 820, 536 S.W.2d 719 (1976).

Vendor's breach of contract action against purchasers of real estate properly dismissed where the purchasers did not sign a sales contract. *Blackmon v. Berry*, 57 Ark. App. 1, 939 S.W.2d 863 (1997).

### —Adverse Possession.

A parol agreement to divest title acquired by adverse possession comes within the statute. *Parham v. Dedman*, 66 Ark. 26, 48 S.W. 673 (1898).

In a suit by the owner of land seeking specific performance of a verbal contract to sell the land, defended on the ground of adverse possession, the plaintiff could not use its oral and unenforceable agreement with the defendant to purchase the land as breaking the continuity of adverse possession by recognition of his title without being obliged to abide by such agreement if the defendant elected to purchase it. *Chicago Mill & Lumber Co. v. Matthews*, 163 Ark. 571, 260 S.W. 963 (1924).

### —Agreements to Buy and Resell.

A verbal contract to divide the proceeds of the sale of land to be thereafter made is not within the statute of frauds. *Sullivan v. Winters*, 91 Ark. 149, 120 S.W. 843 (1909).

A verbal agreement between two persons whereby they agree to buy certain lands jointly and to divide the profits from a resale thereof is not within the statute of frauds. *Beebe v. Olentine*, 97 Ark. 390, 134 S.W. 936 (1911).

An oral partnership agreement for the purpose of buying and selling lands, leases and royalties for speculation, entered into before any property was purchased, was not within this statute. *Russell v. Williams*, 197 Ark. 1086, 126 S.W.2d 614 (1939).

The statute of frauds does not apply to an oral contract of partnership formed for the purpose of buying and selling land. *Quinn v. Stuckey*, 229 Ark. 956, 319 S.W.2d 839 (1959).

Trial court erred in concluding that the daughter was bound by the terms of the property sale agreement between two divorcing parties where the daughter was not a party to the original divorce action, she was not represented by counsel during the divorce proceedings before the trial court, and she was not asked by the court as part of the record of the divorce proceedings if she heard the agreement and agreed to its terms. *Baker v. Daves*, 83 Ark. App. 145, 119 S.W.3d 53 (2003).

#### —Delivery of Deed or Title.

The rule that the delivery of a deed in escrow takes the case out of the statute of frauds applies only in favor of the grantee therein. *Barr v. Johnson*, 102 Ark. 377, 144 S.W. 527 (1912).

A contract to purchase land is not within the statute of frauds where a check for the purchase money was given, an abstract title furnished and a deed executed and placed in escrow. *Hollabaugh v. Taylor*, 134 Ark. 415, 204 S.W. 628 (1918).

Where there was no delivery of a deed signed by the owner of the land to the alleged purchaser, the requirements of the statute of frauds were not performed and specific performance was denied. *Wyatt v. Yingling*, 213 Ark. 160, 210 S.W.2d 122 (1948).

Complaint for specific performance by vendor of a contract for sale of land was insufficient, though down payment made, and deed delivered by vendor in escrow with third party for delivery to vendee, as rule that delivery of deed takes case out of statute of frauds applies only in favor of

the vendee. *Faith v. Epperson*, 213 Ark. 1002, 214 S.W.2d 223 (1948).

#### —Easements.

An easement is a liberty, privilege or advantage which one man may have in the lands of another without profit and must be held under a deed or other instrument in writing or by prescription. *Wynn v. Garland*, 19 Ark. 23 (1857).

The conveyance of an easement comes within the statute. *Belser v. Moore*, 73 Ark. 296, 84 S.W. 219 (1904).

Though a grant of an easement is embraced within the operation of the statute of frauds and must therefore be in writing, a parol grant, when executed as by building a wall, will be upheld and sustained under the same circumstances and on the same principle that a parol contract for the sale of land would be. *Allison v. Schweitzer*, 144 Ark. 123, 221 S.W. 454 (1920).

An individual asserting an easement by prescription has the burden of proof to show by a preponderance of the evidence that use of the roadway has been adverse to the owner and his predecessors in title under claim of right for the statutory period. *Fields v. Ginger*, 54 Ark. App. 216, 925 S.W.2d 794 (1996).

#### —Estoppel.

Where wife joined in oral contract with her husband to sell homestead land and purchaser was immediately placed in possession, wife was held estopped to set up alleged invalidity of oral contract. *Nicholas v. Ward*, 205 Ark. 318, 168 S.W.2d 1095 (1943).

#### —Miscellaneous Contracts.

Parol contract to purchase an interest in rented land and entry thereunder was within the statute of frauds. *Anthony v. Hunt*, 31 Ark. 481 (1876).

A parol promise to reconvey land comes within the statute of frauds. *Holt v. Moore*, 37 Ark. 145 (1881); *Patton v. Randolph*, 197 Ark. 653, 124 S.W.2d 823 (1939).

An agreement to dig a well is not a contract for an interest in land. *Plunkett v. Meredith*, 72 Ark. 3, 77 S.W. 600 (1903).

A verbal contract conveying the right to redeem land sold for taxes is void. *Henry v. Knod*, 74 Ark. 390, 85 S.W. 1130 (1905).

An oral promise to renew a bond for title after cancellation of the original is void.

King v. Crone, 114 Ark. 121, 169 S.W. 238 (1914).

Statute of frauds was not applicable to subscription agreement by which subscriber was to be deeded certain land. Byington v. Little Rock Chamber of Commerce, 132 Ark. 361, 201 S.W. 122 (1918).

An oral agreement to settle suit by alleged purchaser at tax sale for possession of property was not within this statute. Hastings v. Westfall, 194 Ark. 1139, 110 S.W.2d 513 (1937).

An oral family settlement in a dispute over land was held unenforceable as being within this statute. Eckles v. Whitehead, 196 Ark. 680, 119 S.W.2d 550 (1938).

Oral contracts to devise real property are invalid unless there is such part performance as will take the case out of the statute of frauds. Janes v. Rogers, 224 Ark. 116, 271 S.W.2d 930 (1954).

An oral contract to make an enforceable contract covering the sale of real estate and the sale of personalty was within the purview of the statute of frauds. Lee Wilson & Co. v. Springfield, 230 Ark. 257, 321 S.W.2d 775 (1959).

There was a binding contract where an agreement was made for the appellee to buy the appellant's share in a parcel of property, the appellee made all payments under this agreement, and the only reason a note and mortgage were not prepared was because the appellant asked the attorney who handled mutual affairs for the parties not to prepare the documents. Stewart v. Stewart, 72 Ark. App. 405, 37 S.W.3d 667 (2001).

Debtor/tenant had not provided evidence that the agreement between the debtor and the creditor for rental use of the property with an option to purchase was taken out of the purview of the Statute of Frauds because the debtor had not actually taken steps toward the purchase of the property. Lott v. Sponer Land, Ltd., — F. Supp.2d —, 2007 U.S. Dist. LEXIS 7874 (W.D. Ark. Feb. 2, 2007).

Debtor had established that she had an equitable interest in the land where the debtor had a trailer parked because the debtor claimed she had an oral rent-to-own agreement with the property owner, the debtor had made payments to the owner for substantially all of the agreed-upon purchase price, the debtor had made improvements on the property. The debtor's actions took the oral agreement out of

the purview of the Statute of Frauds, § 4-59-101. In re Paro, 362 B.R. 419 (Bankr. E.D. Ark. 2007).

### —Mortgages.

When the debt secured by a mortgage has been paid, a contract that the mortgage shall thereafter serve as security for another debt must be in writing. Ross v. Hodges, 108 Ark. 270, 157 S.W. 391 (1913).

Where the mortgagor of land was in possession after foreclosure sale with the right to redeem, an oral agreement to extend the part of the redemption on specified terms, followed by acceptance of part of the redemption money pursuant to this agreement, is sufficient to take the transaction out of the operation of the statute of frauds. Coates v. Dortch, 145 Ark. 82, 224 S.W. 721 (1920).

An oral agreement to satisfy a mortgage does not fall within the statute of frauds. Riley v. Atherton, 185 Ark. 425, 47 S.W.2d 568 (1932).

A mortgagee's oral agreement to protect the homestead of the mortgagor's wife from foreclosure of the mortgage including it was held not within the statute of frauds. City Nat'l Bank v. Riggs, 188 Ark. 420, 66 S.W.2d 293 (1933).

As long as the right to defeat the purchase by the mortgagor by redemption exists, agreements with mortgagee to extend the time or modify the conditions for redemption are not within this statute. Williams v. Dumas, 197 Ark. 1011, 126 S.W.2d 934 (1939).

Although a parol agreement to satisfy a mortgage is not void by reason of this statute, the proof relating to the discharge or release thereof must be clear, satisfactory and convincing. Watts v. Martin, 202 Ark. 626, 151 S.W.2d 986 (1941).

### —Part Performance.

The statute of frauds did not apply to an oral modification of a contract for the purchase of real property, which modification reduced the price of the property, since there was part performance of the contract where the defendant purchasers took possession of the home and tendered a check to the plaintiff sellers for \$ 500. Johnston v. Curtis, 70 Ark. App. 195, 16 S.W.3d 283 (2000).

### —Real Estate Agents.

A contract employing a real estate agent need not be in writing. Kempner v. Gans,

87 Ark. 221, 111 S.W. 1123 (1908), rehearing denied, 87 Ark. 221, 112 S.W. 1087 (1908); Forrester-Duncan Land Co. v. Evatt, 90 Ark. 301, 119 S.W. 282 (1909); Vaught v. Paddock, 98 Ark. 10, 135 S.W. 331 (1911); Blanton v. Jonesboro Bldg. & Loan Ass'n, 176 Ark. 315, 3 S.W.2d 964 (1928); Vanenburg v. Duffey, 177 Ark. 663, 7 S.W.2d 336 (1928).

Oral agreement between real estate broker and builder whereby builder was to pay broker commission for any building contracts which broker might obtain for builder was not a sale of interest in land so as to fall within the provisions of this section. Brown v. Lee, 242 Ark. 122, 412 S.W.2d 273 (1967).

#### —Recovery of Money or Property.

Where a party has paid money or delivered property on a parol contract for the purchase of land, which is void by the statute of frauds, he cannot maintain an action for the money or property so paid or delivered, so long as the other party is able and willing to perform the contract. Venable v. Brown, 31 Ark. 564 (1876).

Where a contract is unenforceable under the statute of frauds, a party who has paid anything of value to the other party who refuses to perform is entitled to recover amounts paid to the other in good faith. Gilton v. Chapman, 217 Ark. 390, 230 S.W.2d 37 (1950).

In view of fact that this section protects the rights of the vendor only, a vendee seeking to recover the purchase price or a portion thereof paid in consideration of an oral contract cannot set up the statute against a vendor who is ready and willing to perform. Betnar v. Rose, 259 Ark. 820, 536 S.W.2d 719 (1976).

Where homebuilder was willing and able to perform in connection with oral real estate sales agreement, purchaser could not maintain an action to recover money held in escrow as payment upon the purchase price. Betnar v. Rose, 259 Ark. 820, 536 S.W.2d 719 (1976).

#### —Rescission.

An agreement to rescind a written contract as to land is within the statute of frauds. Carter v. Munn, 55 Ark. 73, 17 S.W. 445 (1891); Friar v. Baldrige, 91 Ark. 133, 120 S.W. 989 (1909); Barrett v. Durbin, 106 Ark. 332, 153 S.W. 265 (1913).

A verbal rescission of an option contract to purchase land is available in equity to

repel a claim upon that contract. Atkinson v. Thomas, 138 Ark. 47, 210 S.W. 779 (1919).

An oral agreement to rescind a contract, whereby an owner of land conveyed by deed the standing timber on the land together with a note for an additional sum in exchange for an automobile, was held not in contravention of the statute of frauds where the automobile was returned pursuant to the agreement to rescind and where the grantee had never taken possession of the timber. Robertson v. Lain, 168 Ark. 210, 269 S.W. 574 (1925).

#### —Specific Performance.

Specific performance was granted on oral contract for sale of land. Sebold v. Williamson, 203 Ark. 741, 158 S.W.2d 667 (1942); Marsh v. Marsh, 213 Ark. 366, 210 S.W.2d 811 (1948).

A purchaser of realty who holds a receipt for a down payment but who was never placed in possession, was not entitled to specific performance of the contract but was entitled to the return of his money plus interest; however, a purchaser of realty who was placed in possession of the realty mutually understood to be conveyed, and whose subsequent payments were accepted, was entitled to a reformation of a deed, and specific performance as it was taken out of the statute of frauds. Kromray v. Stobaugh, 212 Ark. 377, 206 S.W.2d 171 (1947).

A court of equity may grant specific performance of a parol contract to convey land, but only where the evidence of the agreement is clear, satisfactory and convincing of something to take it out of the statute of frauds. McNutt v. Carnes, 213 Ark. 346, 210 S.W.2d 290 (1948).

In order to remove an oral contract to convey land from the statute of frauds, improvements made pursuant to the alleged contract must have been so valuable and substantial in nature that refusal of specific performance would have been inequitable. Pfeifer v. Raper, 253 Ark. 438, 486 S.W.2d 524 (1972).

#### —Timber.

Delivery of timber sold and payment of the price thereof takes the contract out of the statute of frauds. Robinson v. Wynne, 97 Ark. 366, 134 S.W. 319 (1911).

Growing timber as real estate can be conveyed by deed only; any other mode of

transfer would be within the statute of frauds and void. *Griffith v. Ayer-Lord Tie Co.*, 109 Ark. 223, 159 S.W. 218 (1913); *Carnahan v. Terrall Bros.*, 137 Ark. 407, 209 S.W. 64 (1919).

A contract to purchase timber land, plaintiff to take title, and defendant to advance the purchase price and take a mortgage as security, is not within the statute of frauds. *Bonner v. Kimball-Lacy Lumber Co.*, 114 Ark. 42, 169 S.W. 242 (1914).

A sale of growing trees is within the statute of frauds. *Broderick v. McRae Box Co.*, 138 Ark. 215, 210 S.W. 935 (1919).

An oral contract for the sale of timber was taken out of the statute of frauds where the seller furnished the buyer money with which to erect a mill and where the buyer entered the land and did erect the mill with the money. *J.D. Kilgore Lumber Co. v. Halley*, 140 Ark. 448, 215 S.W. 653 (1919).

Where the vendor of standing timber received payment and the purchaser entered into possession, this took the contract out of the statute of frauds, though it was oral. *Beattie v. Smith*, 146 Ark. 532, 226 S.W. 168 (1920).

A contract for the cutting and removal of timber which was signed by a lumber company and was delivered to the land owner, who did not sign it until an addenda was added fixing the starting time for the contract, the addenda being pasted to the original, was binding on the company and was not void under the provisions of the statute of frauds. *Standridge v. Rice*, 212 Ark. 703, 207 S.W.2d 598 (1948).

Oral contract to sell timber violated statute of frauds. *Ozan Lumber Co. v. Price*, 219 Ark. 709, 244 S.W.2d 486 (1951).

Specific performance of an oral contract to convey timber where the price agreed upon had been paid and accepted by the seller and the buyer had started cutting the timber, but the seller had not signed the deed to the timber. *Poore v. Slaughter*, 245 Ark. 203, 431 S.W.2d 837 (1968).

Standing timber is a part of the realty and sales of it constitute sales of an interest in the realty within the meaning of the statute of frauds. *Sterling v. Landis*, 9 Ark. App. 290, 658 S.W.2d 429 (1983).

### **Contract for Employment.**

The fact that the commissions might be paid to employee for a period of time longer than one year did not bring the employment contract within the statute of frauds. *Johnson v. Harrywell, Inc.*, 47 Ark. App. 61, 885 S.W.2d 25 (1994).

### **Contracts Not Performed Within Year.**

A promise to pay a debt, without fixing a time therefor, is an immediate contract, and not within the statute. *Lanagin v. Nowland*, 44 Ark. 84 (1884); *Arkansas Midland Ry. v. Whitley*, 54 Ark. 199, 15 S.W. 465 (1891); *Sweet v. Desha Lumber & Planing Co.*, 56 Ark. 629, 20 S.W. 514 (1892).

Parol contracts for personal services for a longer period than one year are void; part performance does not take them without the statute, nor does a contingency that subjects them to a sooner termination. *Meyer v. Roberts*, 46 Ark. 80 (1885); *Henry v. Wells*, 48 Ark. 485, 3 S.W. 637 (1886); *Oak Leaf Mill Co. v. Cooper*, 103 Ark. 79, 146 S.W. 130 (1912); *Izard v. Connecticut Fire Ins. Co.*, 128 Ark. 433, 194 S.W. 1032 (1917).

In order to bring a contract within the statute of frauds as one not to be performed within a year, it must be one that by its terms is not to be performed within a year. *Sullivan v. Winters*, 91 Ark. 149, 120 S.W. 843 (1909).

Contract held to be performable within one year. *Valley Planting Co. v. Wise*, 93 Ark. 1, 123 S.W. 768 (1909); *Brickey v. Continental Gin Co.*, 113 Ark. 15, 166 S.W. 744 (1914).

Contract held to be performable within one year where events might terminate its operation within that period. *Hampton v. Caldwell & Hall*, 95 Ark. 387, 129 S.W. 816 (1910); *Graham v. Jonesboro, L. C. & E. R. Co.*, 111 Ark. 598, 164 S.W. 729 (1914); *Moon v. Gilliam*, 187 Ark. 581, 61 S.W.2d 64 (1933).

A verbal contract entered into in one year for employment for the whole next year was within the statute of frauds and could not be taken outside the operation of the statute either by part performance or by an acknowledgment thereof by the defendant within the next year. *Oak Leaf Mill Co. v. Cooper*, 103 Ark. 79, 146 S.W. 130 (1912).

An oral contract for the erection of a building which may be performed within a

year is not prohibited by the statute of frauds. *Friedman v. Schleuter*, 105 Ark. 580, 151 S.W. 696 (1912).

Where the consideration of buyer's signing certain notes due more than one year after their making was that the seller would turn over to him certain insurance business which the seller failed to do, it was held that although this agreement was still within the statute of frauds in a suit on the notes, it could not be availed of as a defense to the notes, being a partial failure of the consideration thereof. *Hamburg Bank v. Ahrens*, 118 Ark. 548, 177 S.W. 14 (1915).

Contracts held not to be performable within one year. *Harrower v. Insurance Co. of N. Am.*, 144 Ark. 279, 222 S.W. 39 (1920); *McPhail v. Laughrun*, 214 Ark. 476, 217 S.W.2d 244 (1949); *Peters v. Hubbard*, 242 Ark. 839, 416 S.W.2d 300 (1967).

A contract that may be performed within a year from the making thereof is not within the statute, though the fruition of such a contract does not accrue until after the expiration of that time. *Reed Oil Co. v. Cain*, 169 Ark. 309, 275 S.W. 333 (1925).

Where there was a conflict of testimony as to whether a contract of employment was to be performed within a year, the question was properly left to the jury. *Blanton Co. v. Stewart*, 182 Ark. 934, 33 S.W.2d 50 (1930).

An oral contract for one year's employment made retroactive is valid under the statute. *Blanton Co. v. Burke*, 183 Ark. 797, 38 S.W.2d 1086 (1931).

While an oral contract for personal services in excess of one year was void and part performance would not remove it from operation of statute of frauds, the employer was liable for whatever service was rendered. *Swafford v. Sealtest Foods Div. of Nat'l Dairy Prods. Corp.*, 252 Ark. 1182, 483 S.W.2d 202 (1972).

Statute of frauds was not applicable to employment contract because it was for an indefinite duration and was terminable at the will of either party; hence, the possibility existed that the contract could be performed within one year of its inception. *Country Corner Food & Drug, Inc. v. Reiss*, 22 Ark. App. 222, 737 S.W.2d 672 (1987).

A contract does not come within the statute of frauds where the testimony shows it could be performed within a year,

although there was a possibility or even a probability that it might require a longer time. *Chadwell v. Pannell*, 27 Ark. App. 59, 766 S.W.2d 38 (1989).

### **Debts Contracted During Infancy.**

Installment buyer of second-hand automobile is estopped from disaffirming contract on ground that he was a minor at time contract was signed, where he knew that it was necessary to be at or over age of majority at the time of the sale and where, *inter alia*, after reaching full age, he made a number of payments, drove the car 35,000 miles, and collected for claims on the automobile's collision coverage, since these acts show that he affirmed the contract after his majority had been reached. *Haydon v. Hillhouse*, 223 Ark. 957, 270 S.W.2d 910 (1954).

### **Debts Discharged in Bankruptcy.**

A partial payment of debt discharged in bankruptcy is not sufficient evidence of a new promise to pay to revive the debt. *Polk v. Stephens*, 118 Ark. 438, 176 S.W. 689 (1915).

No particular form of words is necessary but the promise to pay a debt discharged in bankruptcy must be clear, distinct and unequivocal and there must be a clear and certain identification of the particular debt intended to be revived. *Bank of Searcy v. Kroh*, 195 Ark. 785, 114 S.W.2d 26 (1938).

### **Lease for Longer Than a Year.**

An oral agreement altering a written lease for a term of years, though unenforceable as a contract under the statute of frauds, will operate as an estoppel as against the lessor and his grantee, where the lessor by his conduct led the lessee to act upon such oral agreement and the grantee took with notice thereof. *Conley v. Johnson*, 69 Ark. 513, 64 S.W. 277 (1901).

An agreement for a lease of land for a year to begin at a future date whose consideration was an agreement of the lessees to make certain improvement and do certain work upon the land during the lease, though not in writing, does not fall within the statute of frauds. *Thomas v. Croom*, 102 Ark. 108, 143 S.W. 88 (1912).

An oral contract to lease land for one year to commence at a date subsequent to the contract is not within the statute. *Alexander-Amberg & Co. v. Hollis*, 115 Ark. 589, 171 S.W. 915 (1914); *Boddy v.*

Thompson, 179 Ark. 71, 14 S.W.2d 240 (1929).

If the provision for renewal of a lease contains no requirement that the option be exercised in writing, notice may be given orally. *Neal v. Harris*, 140 Ark. 619, 216 S.W. 6 (1919).

A parol agreement by a landlord to reduce the rent of his tenant from date if the tenant will agree to renew her lease for another year which period is to begin at a time which is more than a year away is valid under the statute. *Cook v. Cave*, 163 Ark. 407, 260 S.W. 49 (1924).

A contract by which the plaintiff was to obtain a lease for a period of less than a year with an option to renew for a period of more than a year, in consideration of cash payment and of further payments during the period of the lease and renewal, was held not within the statute of frauds where the contract was completely executed on the plaintiff's side within a year and nothing remained on the other side but the payment of compensation during a period of more than a year. *Manufacturers' Furn. Co. v. Cantrell*, 172 Ark. 642, 290 S.W. 353 (1927).

Subdivision (a)(5) had no application to unlawful detainer action against tenant who had been in possession under oral contract providing for free rental for the first three years. *Bolin v. Drainage Dist.*, 206 Ark. 459, 176 S.W.2d 143 (1943).

This statute will not be allowed to so operate as to permit one to enter upon the lands of another, as a tenant, and after so occupying for more than a year, say that he may neither be dispossessed, nor required to pay rent because of the statute. *Bolin v. Drainage Dist.*, 206 Ark. 459, 176 S.W.2d 143 (1943).

A stipulation in a lease for renewal was in effect a provision for mutual extension of the term, and oral testimony was proper to show that the provision had been invoked. *Beasley v. Boren*, 210 Ark. 608, 197 S.W.2d 287 (1946).

An oral lease of land for one year evidenced by a receipt for one year's rent, and a similar receipt for the next year did not violate this section. *Scott v. Altom*, 240 Ark. 710, 401 S.W.2d 734 (1966).

A year-to-year periodic tenancy does not violate subsection (a)(5). *Smith v. Campbell*, 71 Ark. App. 23, 26 S.W.3d 139 (2000).

### **Modification of Contracts.**

A contract required to be in writing cannot be changed, modified or contradicted by a subsequent parol contract. *Arkmo Lumber Co. v. Cantrell*, 159 Ark. 445, 252 S.W. 901 (1923).

The general rule that a material modification of a contract within the statute of frauds must be in writing to be valid has no application where the change does not affect an essential part of the contract but merely substitutes a mode of performance thereof not within the statute. *Valley Planing Mill Co. v. Lena Lumber Co.*, 168 Ark. 1133, 272 S.W. 860 (1925).

Parol evidence is competent to establish an oral modification of agreements contained in an instrument required to be in writing by the statute of frauds when offered by a stranger to the written instrument. *Sterling v. Landis*, 9 Ark. App. 290, 658 S.W.2d 429 (1983).

A contract for the transfer of an interest in real estate is required to be in writing under the statute of frauds and cannot be modified in essential parts by parol agreement and be held valid against a plea that it is invalid under that statute; thus oral modifications to contract for transfer of interest in real estate are changes to the essential elements of the agreement which if not evidenced by the required memorandum, could not be held valid against a plea of invalidity under the statute of frauds. *Davis v. Patel*, 32 Ark. App. 1, 794 S.W.2d 158 (1990).

Finding against the relatives in an action stemming from the relatives' default on a promissory note and security agreement previously executed was proper pursuant to subdivision (a)(6) of this section because any agreement such as alleged by the relatives to substitute services for money owed was a material modification and, in order to be effective, the modification would have to have been in writing, which the relatives failed to produce. *Housley v. Hensley*, 100 Ark. App. 118, 265 S.W.3d 136 (2007).

### **Partial or Full Performance.**

Payment of purchase price alone is not part performance sufficient to take oral contract for sale of land out of the statute of frauds. *Underhill v. Allen*, 18 Ark. 466 (1857); *Bromley v. Aday*, 70 Ark. 351, 68 S.W. 32 (1902); *Fryer v. Mabin*, 158 Ark. 579, 250 S.W. 877 (1923); *French v. Castle-*

berry, 238 Ark. 1038, 386 S.W.2d 482 (1965). But see *Ferguson v. C. H. Triplett Co.*, 199 Ark. 546, 134 S.W.2d 538 (1939).

Part performance of a parol contract for a life tenancy takes it out of the statute. *Saint Louis, A. & T. Ry. v. Graham*, 55 Ark. 294, 18 S.W. 56 (1892).

Payment of the purchase price in full and making of valuable improvements on the land bought takes a verbal sale out of the statute of frauds. *Pembroke v. Logan*, 71 Ark. 364, 74 S.W. 297 (1903).

Performance held sufficient to take oral contract for conveyance of land or interest in land out of statute of frauds. *Ellis v. Campbell*, 84 Ark. 584, 106 S.W. 939 (1907); *Dyer v. Dyer*, 116 Ark. 487, 173 S.W. 394 (1915); *Swift v. Swift*, 121 Ark. 197, 180 S.W. 742 (1915); *Bostleman v. Henkle*, 152 Ark. 628, 239 S.W. 30 (1922); *Hollowoa v. Buck*, 174 Ark. 497, 296 S.W. 74 (1927); *Southwestern Veneer Co. v. Dennison*, 174 Ark. 560, 298 S.W. 30 (1927); *Minich v. Bass*, 183 Ark. 350, 36 S.W.2d 66 (1931); *Person v. Miller Levee Dist.*, 202 Ark. 876, 154 S.W.2d 15 (1941); *Henneberger v. Duncan*, 204 Ark. 4, 161 S.W.2d 380 (1942); *Baker v. Taylor & Co.*, 218 Ark. 538, 237 S.W.2d 471 (1951); *Kinney v. Patterson*, 225 Ark. 393, 282 S.W.2d 809 (1955); *Carpenter v. Franklin*, 228 Ark. 512, 308 S.W.2d 829 (1958); *Harper v. Albright*, 228 Ark. 760, 310 S.W.2d 475 (1958); *Harrison v. Oates*, 234 Ark. 259, 351 S.W.2d 431 (1961); *Marshall v. McCray*, 241 Ark. 184, 406 S.W.2d 863 (1966); *Pfeifer v. Raper*, 253 Ark. 438, 486 S.W.2d 524 (1972); *White v. White*, 254 Ark. 257, 493 S.W.2d 133 (1973); *Bramlett v. Selman*, 268 Ark. 457, 597 S.W.2d 80 (1980).

A parol sale of land is taken without the statute of frauds where the vendee pays the purchase money, takes possession under his contract of purchase and makes valuable and permanent improvements. *Lee v. Foushee*, 91 Ark. 468, 120 S.W. 160 (1909); *Carpenter v. Franklin*, 228 Ark. 512, 308 S.W.2d 829 (1958).

A verbal lease of land for a term of years is taken outside the statute of frauds where the lessee is in possession, pays the rent and valuable improvements at his own expense. *Reichardt v. Howe*, 91 Ark. 280, 121 S.W. 347 (1909); *Phillips v. Grubbs*, 112 Ark. 562, 167 S.W. 101 (1914); *Garner v. Starling*, 137 Ark. 464, 208 S.W. 593 (1919); *City Nat'l Bank v. Fite*, 186 Ark. 266, 53 S.W.2d 440 (1932).

Lease for more than one year held to be removed from statute of frauds by part or full performance. *Reichardt v. Howe*, 91 Ark. 280, 121 S.W. 347 (1909); *Phillips v. Grubbs*, 112 Ark. 562, 167 S.W. 101 (1914); *Grant v. Burrows*, 139 Ark. 16, 212 S.W. 95 (1919); *Newton v. Mathis*, 140 Ark. 252, 215 S.W. 615 (1919); *City Nat'l Bank v. Fite*, 186 Ark. 266, 53 S.W.2d 440 (1932).

Where a defendant joined the wall of his building to the wall of the plaintiff's building under an oral agreement to pay part of the cost of plaintiff's wall, he could not defend an action for part of the cost of the wall upon the ground that the contract was within the statute of frauds; performance of the contract having taken it without the statute. *Salysers v. Legate*, 93 Ark. 606, 125 S.W. 1010 (1910).

Part performance of agreement to provide services in exchange for devise of real property held sufficient to take agreement out of the statute of frauds. *Fred v. Asbury*, 105 Ark. 494, 152 S.W. 155 (1912); *Janes v. Rogers*, 224 Ark. 116, 271 S.W.2d 930 (1954).

The taking possession of land in pursuance of a contract of sale, together with payment in full or in part of the purchase price, is a sufficient part performance to take the contract out of the statute of frauds. *State Bank v. Sanders*, 114 Ark. 440, 170 S.W. 86 (1914); *Branstetter v. Branstetter*, 115 Ark. 154, 170 S.W. 989 (1914); *Ferguson v. C. H. Triplett Co.*, 199 Ark. 546, 134 S.W.2d 538 (1939); *Harper v. Albright*, 228 Ark. 760, 310 S.W.2d 475 (1958).

Performance held to be insufficient to take oral contract for conveyance of land or interest in land out of statute of frauds. *Dyer v. Dyer*, 116 Ark. 487, 173 S.W. 394 (1915); *Starrett v. Dickson*, 136 Ark. 326, 206 S.W. 441 (1918); *Purvis v. Erwin*, 167 Ark. 345, 268 S.W. 355 (1925); *Hudspeth v. Thomas*, 214 Ark. 347, 216 S.W.2d 389 (1949); *Ozan Lumber Co. v. Price*, 219 Ark. 709, 244 S.W.2d 486 (1951); *Hyder v. Newcomb*, 236 Ark. 231, 365 S.W.2d 271 (1963); *French v. Castleberry*, 238 Ark. 1038, 386 S.W.2d 482 (1965).

Part performance of agreement to answer for the debts of another held sufficient to take the agreement out of the statute of frauds. *Martin v. State ex rel. Saline County*, 171 Ark. 576, 286 S.W. 873 (1926).

Proof of payments made under oral contract for the sale of land held a part performance of the contract sufficient to take contract out of the statute of frauds. *Ferguson v. C. H. Triplett Co.*, 199 Ark. 546, 134 S.W.2d 538 (1939). But see *Underhill v. Allen*, 18 Ark. 466 (1857) and following cases.

Part performance is a question of proof under the statute of frauds. *Amisano v. Shaw*, 214 Ark. 874, 218 S.W.2d 707 (1949).

The argument of the plaintiff that part performance of the contract, even if the statute of frauds is otherwise applicable, would satisfy the statute and render it inapplicable to this case could not be maintained in as much as the contract was not to be performed within one year. *Cobb v. Southern Plaswood Corp.*, 171 F. Supp. 691 (W.D. Ark. 1959). But see *Young v. Young*, 238 Ark. 795, 929, 384 S.W.2d 469 (1964); *Talley v. Blackmon*, 271 Ark. 494, 609 S.W.2d 113 (Ct. App. 1980).

Part or full performance of contract not to be performed within a year held sufficient to take agreement out of statute of frauds. *Young v. Young*, 238 Ark. 795, 929, 384 S.W.2d 469 (1964); *Talley v. Blackmon*, 271 Ark. 494, 609 S.W.2d 113 (Ct. App. 1980). But see *Cobb v. Southern Plaswood Corp.*, 171 F. Supp. 691 (W.D. Ark. 1959).

Part performance takes an oral contract for the sale of land out of the statute of frauds. *Marshall v. McCray*, 241 Ark. 184, 406 S.W.2d 863 (1966).

Part payment of the purchase price and delivery of the merchandise is usually sufficient to take an otherwise valid contract out of the statute of frauds. *Lake Village Implement Co. v. Cox*, 249 Ark. 733, 461 S.W.2d 108 (1970).

Partial performance of a contract for personal services does not take a verbal contract out of the operation of the statute of frauds, except for that part which was performed. *Country Corner Food & Drug, Inc. v. Reiss*, 22 Ark. App. 222, 737 S.W.2d 672 (1987).

Evidence sufficient to find sufficient detrimental reliance on the part of plaintiff to take the contract out of the operation of the statute of frauds. *Country Corner Food & Drug, Inc. v. Reiss*, 22 Ark. App. 222, 737 S.W.2d 672 (1987).

Partial or full payment of consideration together with taking of possession by the

purchaser is sufficient to remove an oral contract from the statute of frauds. *Chadwell v. Pannell*, 27 Ark. App. 59, 766 S.W.2d 38 (1989).

#### —Actions.

The evidence was sufficient to support a jury finding of an oral contract and sufficient performance to take it out of the statute of frauds where (1) the former manager for the defendant testified that it was common in his industry for business to be done with a hand shake and no written contract and that he honored his agreement and intended a long term agreement with the plaintiff, and (2) the plaintiff also intended a long term agreement and purchased equipment based on representations made by the former manager. *Mann Bros. Logging, Inc. v. Potlatch Corp.*, 149 F.3d 790 (8th Cir. 1998).

#### —Possession.

The delivery of possession under a verbal contract for the sale of real estate will take the case out of the statute of frauds. *Pindall v. Trevor & Colgate*, 30 Ark. 249 (1875); *Pledger v. Garrison*, 42 Ark. 246 (1883).

Between tenants in common the rule of delivery of possession taking the contract out of the statute is inapplicable. *Haines v. McGlone*, 44 Ark. 79 (1884).

Where possession is relied upon as part performance to take a verbal sale out of the statute of frauds, it must be clearly shown that such possession was taken under the contract of purchase. *Lay v. Lay*, 75 Ark. 526, 87 S.W. 1026 (1905).

Delivery of possession of land before an offer had been accepted by the owners and acts merely preparatory or ancillary to the agreement did not constitute part performance. *Stanford v. Sager*, 141 Ark. 458, 217 S.W. 458 (1920).

Continuance in possession of land by a lessee after an oral purchase is insufficient to take the contract out of the statute of frauds. *Rugen v. Vaughan*, 142 Ark. 176, 218 S.W. 205 (1920).

Where a purchaser of a farm, who finding that he could not pay for it, surrendered its possession to his vendor by directing his son-in-law in possession to attorn to the vendor, which the son-in-law did, and died without executing a reconveyance, the surrender was effective. *Freer v. Less*, 159 Ark. 509, 252 S.W. 354 (1923).

It is sufficient part performance to take an oral exchange of land out of the statute where one party went into possession and caused the land given in exchange to be conveyed to the other party and it is immaterial that the party going into possession did not retain actual, continuous or adverse possession. *Hays v. Goodwin*, 167 Ark. 131, 266 S.W. 933 (1924).

A parol agreement to convey land is valid against the statute of frauds where the grantor surrendered possession but died before making a deed. *McKenzie v. Rumph*, 171 Ark. 791, 286 S.W. 1022 (1926).

Where the plaintiff is in possession and sues for breach of contract to convey the land and the defendant denies the making of such an agreement, and no part of the purchase price has been paid, the defense of the statute of frauds is available. *Stooksberry v. Pigg*, 172 Ark. 763, 290 S.W. 355 (1927).

Under an oral contract to convey land, this statute is met by surrendering possession to the purchaser. *Nicholas v. Ward*, 205 Ark. 318, 168 S.W.2d 1095 (1943).

Delivery of possession under an oral contract for the sale of real estate will take the case out of the statute of frauds. *Harrison v. Oates*, 234 Ark. 259, 351 S.W.2d 431 (1961).

Although two writings entered into for the construction of a house were not valid contracts, once the house was built and the debtors moved in, that took the contract out of subdivision (a)(4) of this section, the statute of frauds, and based on the debtors' testimony regarding the parties' oral agreement with respect to the price to be paid, which the court found credible, the creditors' proof of claim for an additional amount was disallowed. Although the debtors were the prevailing party, they were not entitled to attorneys fees under § 16-22-308, as both parties were responsible for an incoherent agreement with no agreed upon purchase price. *In re Cameron*, — B.R. —, 2011 Bankr. LEXIS 1888 (Bankr. E.D. Ark. May 17, 2011).

### **Pleadings.**

The defense of the statute of frauds is waived unless specifically pleaded. *El Dorado Ice & Planing Mill Co. v. Kinard*, 96 Ark. 184, 131 S.W. 460 (1910).

Where the defense of the statute of frauds was not pleaded in the lower court, it cannot be interjected into the case for the first time on appeal. *Dierks Lumber & Coal Co. v. Coffman*, 96 Ark. 505, 132 S.W. 654 (1910); *Smith v. Milam*, 195 Ark. 157, 110 S.W.2d 1062 (1937).

The statute of frauds cannot be availed unless pleaded. *S.H. Kress Co. v. Moscowitz*, 105 Ark. 638, 152 S.W. 298 (1912).

An oral contract for the conveyance of land raises a moral obligation and the vendor need not plead the statute of frauds in an action for specific performance. *Skinner v. Fisher*, 120 Ark. 91, 178 S.W. 922 (1915).

Where the personal representative of a decedent cannot plead the statute of frauds, a judgment creditor cannot do so. *Arkansas Valley Trust Co. v. Young*, 128 Ark. 42, 195 S.W. 36 (1917).

In an action to charge the defendant on his oral promise to answer for another's debt, an allegation of the complaint that the plaintiff would not have made the loan except for the defendant's personal guaranty did not prevent the statute of frauds from applying. *Elm Springs State Bank v. Bradley*, 179 Ark. 437, 16 S.W.2d 585 (1929).

Complaint for specific performance of a contract for sale of land was insufficient to take case out of statute of frauds, where the complaint failed to allege any writing signed by the vendee, or that vendee had taken possession of land. *Faith v. Epperson*, 213 Ark. 1002, 214 S.W.2d 223 (1948).

Contention of plaintiff that oral cancellation of sale of property was insufficient because within statute of frauds was unavailing where neither party pleaded the statute of frauds. *Rogers v. Moss*, 216 Ark. 838, 227 S.W.2d 630 (1950).

General denial to complaint to recover damages on oral contract to sell timber raised defense of statute of frauds though not affirmatively pleaded, since answer denied existence of a valid contract. *Ozan Lumber Co. v. Price*, 219 Ark. 709, 244 S.W.2d 486 (1951).

### **Promises to Answer for Debts of Another.**

Surety prong of this section, the Arkansas Statute of Frauds, did not bar enforcement of an estoppel certificate signed by a first mortgage holder because the second mortgage holder received new consider-

ation for its promises contained in the certificate in the form of assurances from the first mortgage holder, including a concession that the value of the first mortgage did not exceed a stated amount, and waiver of the first mortgage's non-prepayment clause. *Shelton v. Kennedy Funding, Inc.*, 622 F.3d 943 (8th Cir. 2010).

Contractor filed a counterclaim against a supplier for breach of a cost-override provision of the parties' oral agreement. As the evidence established that the cost-override provision was part of the original agreement, and not for the primary benefit of a subcontractor, the court did not abuse its discretion in finding there was insufficient evidence to support the supplier's request for a jury instruction on the statute of frauds. *Forever Green Ath. Fields, Inc. v. Lasiter Constr., Inc.*, 2011 Ark. App. 347, — S.W.3d — (2011).

#### —Collateral or Original Obligations.

Agreements held to be original, not collateral, undertakings and not subject to statute of frauds. *Cauthron Lumber Co. v. Hall*, 76 Ark. 1, 88 S.W. 594 (1905); *Burgie v. Bailey*, 91 Ark. 383, 121 S.W. 266 (1909); *Brinkley Car Works & Mfg. Co. v. Cook*, 110 Ark. 325, 161 S.W. 1065 (1913); *Smith v. J.M. Taylor & Co.*, 144 Ark. 569, 222 S.W. 1062 (1920); *Layton v. Central States Lead & Zinc Co.*, 147 Ark. 355, 227 S.W. 415 (1921); *Cleveland v. Maddox*, 152 Ark. 538, 239 S.W. 370 (1922); *Guild v. Whitlow*, 162 Ark. 108, 257 S.W. 383 (1924); *Moraz v. Melton*, 167 Ark. 629, 268 S.W. 41 (1925); *Powell v. Jones & Son*, 170 Ark. 809, 281 S.W. 366 (1926); *Nakdimen v. First Nat'l Bank*, 177 Ark. 303, 6 S.W.2d 505 (1928), cert. denied, 278 U.S. 635, 49 S. Ct. 32 (1928); *United States Fid. & Guar. Co. v. Wilson*, 41 F.2d 319 (8th Cir. 1930); *Foster-Grayson Lumber Co. v. Talley*, 190 Ark. 37, 76 S.W.2d 950 (1934); *Vincent v. Wesson*, 204 Ark. 1108, 166 S.W.2d 1023 (1942); *Barnett v. Hughey Auto Parts, Inc.*, 5 Ark. App. 1, 631 S.W.2d 623 (1982); *Jones v. Innkeepers, Inc.*, 12 Ark. App. 364, 676 S.W.2d 761 (1984).

Where an oral promise is made to pay the debt of another out of property placed in the hands of the promisor for that purpose, it is an original promise and not governed by the statute of frauds. *United Walnut Co. v. Courtney*, 96 Ark. 46, 130 S.W. 566 (1910).

Agreements held to be collateral and subject to statute of frauds. *Zimmerman v.*

*Holt*, 102 Ark. 407, 144 S.W. 222 (1912); *Perry v. Jarman*, 125 Ark. 240, 188 S.W. 544 (1916); *Grady v. Dierks Lumber & Coal Co.*, 154 Ark. 255, 242 S.W. 548 (1922).

In determining whether an oral contract is original or collateral, the intention of the parties at the time it was made must be regarded and in determining such intention the words of the promise, the situation of the parties and all the circumstances attending the transaction should be taken into consideration. *Millsaps, Hatchett & Co. v. Nixon*, 102 Ark. 435, 144 S.W. 915 (1912); *Barnett v. Hughey Auto Parts, Inc.*, 5 Ark. App. 1, 631 S.W.2d 623 (1982); *Landmark Sav. Bank v. Weaver-Bailey Contractors, Inc.*, 22 Ark. App. 258, 739 S.W.2d 166 (1987).

Evidence held sufficient to make it a jury question whether promise was original or collateral and within the statute of frauds. *Hinson v. Gillespie*, 131 Ark. 240, 199 S.W. 97 (1917); *Arkadelphia Milling Co. v. Green*, 142 Ark. 565, 219 S.W. 319 (1920); *Grady v. Dierks Lumber & Coal Co.*, 149 Ark. 306, 232 S.W. 23 (1921); *Saul v. Bass*, 152 Ark. 584, 239 S.W. 369 (1922).

Evidence sufficient to present an issue as to whether there was a new and original undertaking by the shopping center owner which would not come within the statute of frauds. *Fausett Co. v. Rand*, 2 Ark. App. 216, 619 S.W.2d 683 (1981).

Original undertakings are not within the statute of frauds and need not be in writing. *Barnett v. Hughey Auto Parts, Inc.*, 5 Ark. App. 1, 631 S.W.2d 623 (1982).

Every collateral undertaking or promise to answer for the debt of another is within this statute and void if not in writing and signed by the person to be charged. *Barnett v. Hughey Auto Parts, Inc.*, 5 Ark. App. 1, 631 S.W.2d 623 (1982); *Rohrscheib v. Helena Hosp. Ass'n*, 12 Ark. App. 6, 670 S.W.2d 812 (1984).

Original undertaking under which benefits are initially obtained, is enforceable and deemed to be outside this statute. *Rohrscheib v. Helena Hosp. Ass'n*, 12 Ark. App. 6, 670 S.W.2d 812 (1984).

All oral undertakings to answer for debt of another are not unenforceable under statute of frauds; promise by a third party to discharge a preexisting debt of another, without any new consideration or benefit passing to him, is a "collateral" understanding and unenforceable under the

statute of frauds; however, notwithstanding the statute of frauds, such a contract is an "original" one and enforceable if founded on new consideration or benefit moving to the promisor. *Landmark Sav. Bank v. Weaver-Bailey Contractors, Inc.*, 22 Ark. App. 258, 739 S.W.2d 166 (1987).

Finding that undertaking was an original one based on valid consideration was not clearly erroneous; therefore, notwithstanding statute of frauds, agreement was enforceable. *Landmark Sav. Bank v. Weaver-Bailey Contractors, Inc.*, 22 Ark. App. 258, 739 S.W.2d 166 (1987).

### —Corporations.

The parol promise of a corporation to pay debts contracted before its incorporation is within the statute. *Little Rock & Ft. S.R.R. v. Perry*, 37 Ark. 164 (1881).

A contract on behalf of a prospective corporation made for its benefit by promoters, though not in writing, is not within the statute of frauds as being a contract to answer for the debt, default or miscarriage of another since, on its adoption by the corporation, it became, in toto, an original undertaking of the corporation. *Layton v. Central States Lead & Zinc Co.*, 147 Ark. 355, 227 S.W. 415 (1921).

In order for an officer of a corporation to bind such corporation by a guaranty of the debt of some other person or corporation it is necessary for him to sign some writing to that effect. *Hutson v. T.M. Dover Mercantile Co.*, 170 Ark. 984, 282 S.W. 371 (1926).

### —Debt of Another.

An agreement by a third party to accept for a creditor his debtor's draft stands upon the same footing as a promise to pay the debt. *Chapline v. Atkinson & Co.*, 45 Ark. 67 (1885); *Killough v. Payne*, 52 Ark. 174, 12 S.W. 327 (1889); *Neal v. Brandon*, 70 Ark. 79, 66 S.W. 200 (1902).

Where person did not agree to pay the debt of another but did promise to pay his own, the promise was not within the statute of frauds and the oral agreement was enforceable. *Faulkner v. Crawford*, 119 Ark. 6, 177 S.W. 35 (1915).

The statute of frauds does not apply where plaintiffs are suing defendants for defendants' own debt, not for the debt of another. *Park v. Burge*, 5 Ark. App. 252, 635 S.W.2d 279 (1982).

### —Estoppel.

Though one had made an oral promise to pay and failed to pay the debt of another, he is not estopped from pleading the statute where his failure to pay worked no fraud on the party to whom the promise was made. *Goldsmith v. First Nat'l Bank*, 169 Ark. 1162, 278 S.W. 22 (1925).

### —Guaranty.

In an action to charge the defendant on his oral guaranty of another's note, the fact that the defendant's promise to pay the other's note, if renewed, was a mere renewal of his original oral promise of guaranty and was not made on any consideration to the defendant, so that such parol promise was as much within the statute of frauds as the original promise. *Elm Springs State Bank v. Bradley*, 179 Ark. 437, 16 S.W.2d 585 (1929).

A special oral indemnity agreement which agreed to hold the surety on a cost bond harmless was held a direct and not a collateral promise and not within the statute of frauds. *United States Fid. & Guar. Co. v. Wilson*, 41 F.2d 319 (8th Cir. 1930).

An oral guaranty is within the statute of frauds. *Washum v. Lester*, 183 Ark. 298, 36 S.W.2d 76 (1931).

### —Medical Services.

Particular agreements for payment for medical services for third person held to be original undertaking not subject to the statute of frauds. *Cleveland v. Maddox*, 152 Ark. 538, 239 S.W. 370 (1922); *Guild v. Whitlow*, 162 Ark. 108, 257 S.W. 383 (1924); *Vincent v. Wesson*, 204 Ark. 1108, 166 S.W.2d 1023 (1942).

Particular agreement for payment of medical services for third person held to be subject to the statute of frauds. *Yaffe v. Pickett*, 196 Ark. 1139, 121 S.W.2d 93 (1938).

### —Miscellaneous Agreements.

A verbal promise by the drawee of a check, after the check had been deposited in the bank by the payee, to pay if the bank failed was not binding. *Burns v. Yocum*, 81 Ark. 127, 98 S.W. 956 (1906).

Promise to pay prisoner's fine and costs was within the statute of frauds. *Flenniken v. Harmon*, 113 Ark. 542, 168 S.W. 1081 (1914).

In absence of a trust impressed on insurance proceeds from death of borrower, promise of wife of deceased borrower to

pay debt after his death was no more than a moral obligation and clearly within the statute of frauds. *Moore v. Lawrence*, 252 Ark. 759, 480 S.W.2d 941 (1972).

#### —New Consideration.

An agreement on a new consideration is not within the statute. *Conger v. Cotton*, 37 Ark. 286 (1881); *Jonesboro Hdwe. Co. v. Western Tie & Timber Co.*, 134 Ark. 543, 204 S.W. 418 (1918).

A promise to pay a debt of another antecedently contracted, where the primary debt still subsists, is original and not within the statute of frauds when it is founded on a new consideration moving to the promisor and beneficial to him and is such that the promisor thereby comes under an independent duty of payment irrespective of the ability of the principal debtor. *Long v. McDaniel*, 76 Ark. 292, 88 S.W. 964 (1905).

A parol promise to pay the debt of another is not within the statute of frauds when it arises from a new and original consideration of benefit or harm moving between the newly contracting parties. *Hunt v. Taggett*, 160 Ark. 617, 255 S.W. 8 (1923); *Burkhart Mfg. Co. v. Berry*, 162 Ark. 123, 257 S.W. 723 (1924).

Defendant's promise to pay the note of a purchaser of a car in consideration that the seller would not retake it was not within the statute of frauds, being supported by a new and independent consideration. *Frame v. Whittam*, 181 Ark. 768, 27 S.W.2d 990 (1930).

#### —Payment.

Payment for land and maintenance of the property were not sufficient to take an oral contract for the sale of land out of the operation of the statute of frauds. *Dolphin v. Wilson*, 328 Ark. 1, 942 S.W.2d 815 (1997).

#### —Preexisting Debts.

An agreement between promisor and debtor that the former will assume the indebtedness of the latter already incurred is an original undertaking and is not within the statute of frauds. *Burgie v. Bailey*, 91 Ark. 383, 121 S.W. 266 (1909).

Where the primary debt for services rendered to a person rests against him and a promise of a third person to pay it is made subsequent to the time it was incurred, such promise is not an original undertaking and is within the statute of

frauds. *Zimmerman v. Holt*, 102 Ark. 407, 144 S.W. 222 (1912).

An oral agreement to stand as surety for an existing debt of another is void. *Savage v. Craig*, 105 Ark. 697, 150 S.W. 146 (1912).

Where the debt has already been incurred, a promise by a third party to discharge the preexisting debt of another without any new consideration or benefit passing to him, is a collateral promise and within the statute; however, even if the debt preexists, a subsequent promise of a third party to pay it is deemed original and enforceable if founded on a new consideration of benefit moving to the promisor. *Barnett v. Hughey Auto Parts, Inc.*, 5 Ark. App. 1, 631 S.W.2d 623 (1982).

Where the original debt has already been incurred, an oral promise by a third party to discharge a preexisting debt without new consideration is a collateral promise and within this statute. *Rohrscheib v. Helena Hosp. Ass'n*, 12 Ark. App. 6, 670 S.W.2d 812 (1984).

A promise to discharge a preexisting debt which is founded on new consideration is enforceable and deemed to be outside this statute. *Rohrscheib v. Helena Hosp. Ass'n*, 12 Ark. App. 6, 670 S.W.2d 812 (1984).

#### —Promisor's Benefit.

An oral promise by a grantee of land to pay a debt of the grantor to a third person as part of the consideration for the conveyance is not within the statute of frauds. *Scott v. Moore*, 89 Ark. 321, 116 S.W. 660 (1909); *Curlee v. Morris*, 196 Ark. 779, 120 S.W.2d 10 (1938).

A verbal promise by a principal contractor that he would reimburse a certain bank for money advanced to a subcontractor upon time checks issued by the subcontractor in completing the contract work is not within the statute of frauds. *S.R.H. Robinson & Son Contracting Co. v. Twin City Bank*, 103 Ark. 219, 146 S.W. 523 (1912).

A finding that a promise by the vendor of an oil drilling rig to see that laborers employed in drilling an oil well were paid their wages was independent and not collateral is sustained by proof that the vendor was interested in having the well drilled in order that it might collect the price of the rig. *Oil City Iron Works v. Bradley*, 171 Ark. 45, 283 S.W. 362 (1926).

The statute forbidding the bringing of an action to charge any person upon an oral promise to answer for the debt, default or miscarriage of another does not apply to a promise to pay debts contracted by an agent at the instance of and for the promisor's benefit. *Lesser-Goldman Cotton Co. v. Merchants & Planters Bank*, 182 Ark. 150, 30 S.W.2d 215 (1930).

#### **—Supplies Furnished to Another.**

Agreements to pay for supplies furnished to another held to be an original undertaking and not statute of frauds. *Cauthron Lumber Co. v. Hall*, 76 Ark. 1, 88 S.W. 594 (1905); *Smith v. J.M. Taylor & Co.*, 144 Ark. 569, 222 S.W. 1062 (1920); *Barnett v. Hughey Auto Parts, Inc.*, 5 Ark. App. 1, 631 S.W.2d 623 (1982).

Agreement to furnish supplies held to be a collateral and not an original undertaking and within the statute of frauds. *Perry v. Jarman*, 125 Ark. 240, 188 S.W. 544 (1916).

Where a corporation promises to pay for supplies furnished to another as an original undertaking, the undertaking is not within the statute of frauds, but if the corporation is merely surety for the purchaser, the case is within the statute and must be evidenced by writing. *Black Bros. Lumber Co. v. Varner*, 164 Ark. 103, 261 S.W. 312 (1924).

The statute of frauds does not apply to a contract for the sale of material to one person, to be delivered to another. *Colum v. Imboden*, 185 Ark. 890, 50 S.W.2d 235 (1932).

#### **Proof.**

To remove an oral contract from the statute of frauds, it is necessary that the quantum of proof be clear and convincing both as to the making of the oral contract and its performance. *Pfeifer v. Raper*, 253 Ark. 438, 486 S.W.2d 524 (1972); *Bramlett v. Selman*, 268 Ark. 457, 597 S.W.2d 80 (1980).

#### **Ratification of Agent's Act.**

It is not essential that the ratification of an agent's act in accepting a contract within the statute of frauds should be in writing, though the acceptance must have been in writing to comply with the statute of frauds. *Arkansas Light & Power Co. v. City of Paragould*, 146 Ark. 1, 225 S.W. 435 (1920).

#### **Unenforceable Agreements.**

An oral agreement to reduce to writing a contract which is within the scope of the operation of the statute of frauds or to sign an agreement which the statute of frauds requires to be in writing is invalid and unenforceable. *Lee Wilson & Co. v. Springfield*, 230 Ark. 257, 321 S.W.2d 775 (1959).

#### **Writing or Memorandum.**

##### **—In General.**

Agreements to repair or build are not required to be in writing. *Halbut v. Forrest City*, 34 Ark. 246 (1879).

An agreement for the conveyance of an undivided interest in a partition fence which is an estate in the land must be in writing. *Rudisill v. Cross*, 54 Ark. 519, 16 S.W. 575 (1891).

Where a written contract for the sale of land is valid under the statute of frauds, its performance will not be defeated because there was another agreement not embraced in the writing. *Davis v. Davis*, 171 Ark. 168, 283 S.W. 360 (1926).

A suit by a purchaser for specific performance of a contract to convey real estate could not be based on a letter from a real estate agent to the vendors where, although the letter satisfied the statute of frauds, it was never delivered to the purchaser. *Harris v. Dacus*, 209 Ark. 1031, 193 S.W.2d 1006 (1946).

A contract in writing which leaves some essential term thereof to be shown by parol is only a parol contract, and not enforceable under the statute of frauds. *Wyatt v. Yingling*, 213 Ark. 160, 210 S.W.2d 122 (1948).

##### **—Extrinsic or Parol Evidence.**

Although designation of the premises in contract or memorandum by street number is ordinarily sufficient to satisfy the statute even though parol evidence must be used where the vendor owns two parcels of land the prospective purchaser could not by parol evidence show that vendor had agreed to also convey part of the other parcel in the transaction. *Creighton v. Huggins*, 227 Ark. 1096, 303 S.W.2d 893 (1957).

While extrinsic evidence may not be used to add to or change a deficient description, it may be used to decipher or make intelligible the terms of the contract to determine compliance with the statute

of frauds. *Boensch v. Cornett*, 267 Ark. 671, 590 S.W.2d 55 (Ark. App. 1979).

Description sufficient to find that the writing was sufficient to satisfy the statute of frauds and allow extrinsic evidence to show facts rendering the description intelligible. *Boensch v. Cornett*, 267 Ark. 671, 590 S.W.2d 55 (Ark. App. 1979).

Where terms used in a deed to create an easement, specifically the word "across," were definite and unambiguous, it was error for the chancellor to admit extrinsic evidence to contradict the terms used in the deed. *Niemeyer v. Griffin*, 309 Ark. 97, 826 S.W.2d 821 (1992).

### —Incorporation of Instruments.

Different writings may be considered together to meet the requirements of the statute of frauds, where they on their face are connected together. *Arkansas Light & Power Co. v. City of Paragould*, 146 Ark. 1, 225 S.W. 435 (1920).

To permit consideration of two or more instruments together in a transaction for the sale of real estate to meet the requirements of the statute of frauds there must be some incorporation by one of the other or some reference to the other found in the instrument. *Sorrells v. Bailey Cattle Co.*, 268 Ark. 800, 595 S.W.2d 950 (Ct. App. 1980).

Instruments could not be combined since one party to the alleged sale of land was not a party to the offer and acceptance and there was no provision in that instrument for any conveyance to her. *Sorrells v. Bailey Cattle Co.*, 268 Ark. 800, 595 S.W.2d 950 (Ct. App. 1980).

### —Sufficiency.

A writing which is dependent upon oral proof to disclose the terms of the contract is not sufficient to answer the requirements of the statute of frauds. *Littell v. Jones*, 56 Ark. 139, 19 S.W. 497 (1892).

Writing regarding promise to answer for the debt of another was sufficient to take case out of statute of frauds. *Clinton v. Ross*, 108 Ark. 442, 159 S.W. 1103 (1912); *Scranton Mercantile Co. v. E. Schneider & Co.*, 163 Ark. 536, 260 S.W. 426 (1924); *Jones v. Innkeepers, Inc.*, 12 Ark. App. 364, 676 S.W.2d 761 (1984).

It is sufficient if the memorandum is signed by the party sought to be charged. *Jones v. School Dist.*, 137 Ark. 414, 208 S.W. 798 (1919).

Description of land to be sold held insufficient to take agreement out of the statute of frauds. *Hotopp v. Adair*, 144 Ark. 629, 223 S.W. 393 (1920); *Kromray v. Stobaugh*, 212 Ark. 377, 206 S.W.2d 171 (1947); *Sorrells v. Bailey Cattle Co.*, 268 Ark. 800, 595 S.W.2d 950 (Ct. App. 1980).

Writing held sufficient to take contract concerning land out of the statute of frauds. *Wilson v. Spry*, 145 Ark. 21, 223 S.W. 564 (1920); *Rawls v. Free*, 184 Ark. 737, 43 S.W.2d 540 (1931); *Coley v. Hall*, 206 Ark. 419, 175 S.W.2d 979 (1943); *Hale v. Hays*, 251 Ark. 759, 475 S.W.2d 145 (1972).

Writing held insufficient to take contract concerning land out of statute of frauds. *Briggs v. Frazer*, 157 Ark. 518, 249 S.W. 9 (1923); *Cobb v. Southern Plaswood Corp.*, 171 F. Supp. 691 (W.D. Ark. 1959); *Dooley v. West*, 210 F. Supp. 239 (W.D. Ark. 1962); *Hyder v. Newcomb*, 236 Ark. 231, 365 S.W.2d 271 (1963); *Shipp v. Bell & Ross Enters., Inc.*, 256 Ark. 89, 505 S.W.2d 509 (1974).

Writing held sufficient to take contract not to be performed in one year out of statute of frauds. *Central Clay Drainage Dist. v. Hunter*, 174 Ark. 293, 295 S.W. 19 (1927).

To meet the essential and necessary requirements of a valid contract for the sale of real estate, within this statute, contract must embrace the terms and conditions of the sale and it must be a mutual contract. *Tate v. Clark*, 203 Ark. 231, 156 S.W.2d 218 (1941).

Receipt or memorandum not embracing the terms and conditions of alleged sale of land and the time and method of payment being not sufficient to satisfy the requirement of this section cannot be relied upon to enforce specific performance of alleged contract. *Schuman v. Hughes*, 203 Ark. 395, 156 S.W.2d 804 (1941).

A memorandum uncertain as to the time for and method and conditions of payment was insufficient. *Perrin v. Price*, 210 Ark. 535, 196 S.W.2d 766 (1946).

Writing regarding lease for more than a year insufficient to take the transaction out of the statute of frauds. *Norton v. Hindsley*, 245 Ark. 966, 435 S.W.2d 788 (1969).

A description of the land to be conveyed is an essential term of a contract for the sale of land; however, if the memorandum required by this section furnishes a means

by which the realty to be conveyed can be identified, it need not describe the property with the particularity required for deeds. *Boensch v. Cornett*, 267 Ark. 671, 590 S.W.2d 55 (Ark. App. 1979).

**Cited:** *Robinson v. Florence Sanitarium*, 149 Ark. 355, 232 S.W. 590 (1921); *Smith v. Westlake*, 152 Ark. 384, 238 S.W. 34 (1922); *Miles v. Scales*, 174 Ark. 412, 295 S.W. 375 (1927); *Thompson v. Phillips*, 225 Ark. 736, 284 S.W.2d 842 (1955); *Carroll v. Kessinger*, 228 Ark. 450, 307 S.W.2d 880 (1957); *Lee Wilson & Co. v. Springfield*, 230 Ark. 257, 321 S.W.2d 775 (1959); *Kelly v. Weir*, 243 F. Supp. 588 (E.D. Ark. 1965); *Benton v. Fultz*, 241 Ark. 163, 406 S.W.2d 699 (1966); *Farmers Coop. Ass'n v. Webb*, 249 Ark. 277, 459 S.W.2d 815 (1970); *Hyde Wholesale Dry Goods Co. v. Edwards*, 255 Ark. 211, 500 S.W.2d 85 (1973); *Robertson v. Ceola*, 255 Ark. 703,

501 S.W.2d 764 (1973); *Mikel v. Development Co.*, 269 Ark. 365, 602 S.W.2d 630 (1980); *Gray v. Davis*, 270 Ark. 917, 606 S.W.2d 607 (1980); *Pierce-Odom, Inc. v. Evenson*, 5 Ark. App. 67, 632 S.W.2d 247 (1982); *Graves v. Graves*, 7 Ark. App. 202, 646 S.W.2d 26 (1983); *Township Bldrs., Inc. v. Kraus Constr. Co.*, 286 Ark. 487, 696 S.W.2d 308 (1985); *McKay & Co. v. Garland*, 17 Ark. App. 1, 701 S.W.2d 392 (1986); *Western Auto Supply Co. v. Bank of Imboden*, 17 Ark. App. 4, 701 S.W.2d 394 (1986); *Hoffius v. Maestri*, 31 Ark. App. 13, 786 S.W.2d 846 (1990); *First Nat'l Bank v. Adair*, 42 Ark. App. 84, 854 S.W.2d 358 (1993); *Van Dyke v. Glover*, 326 Ark. 736, 934 S.W.2d 204 (1996); *Beavers v. Arkansas State Bd. of Dental Exam'rs*, 151 F.3d 838 (8th Cir. 1998); *Powhatan Cemetery Ass'n v. Phillips*, 90 Ark. App. 424, 206 S.W.3d 277 (2005).

#### 4-59-102. Leases, estates, etc.

(a) All leases, estates, interests of freeholds, or lease of years, or any uncertain interests of, in, to, or out of any messuages, lands, or tenements made or created by livery and seisin only, or by parol, and not put in writing and signed by the parties or their agents lawfully authorized by writing so making or creating the leases, estates, interests of freehold, lease of years, or any uncertain interests, shall have the force and effect of leases or estates at will only, and shall not, either in law or equity, be deemed or taken to have any other or greater effect or force than as leases not exceeding the term of one (1) year.

(b) No leases, estates, or interest, either of freehold or of term of years in, to, or out of any messuages, lands, or tenements, except leases for a term not exceeding one (1) year, shall at any time be assigned, granted, or surrendered unless it is by deed or notice in writing, signed by the party so assigning, granting, or surrendering the leases, estates, interests of freeholds, lease of years, or any uncertain interests, or by their agents lawfully authorized by writing or by operation of law.

**History.** Rev. Stat., ch. 65, §§ 8, 9; C. & M. Dig., §§ 4865, 4866; Pope's Dig., §§ 6062, 6063; A.S.A. 1947, §§ 38-104, 38-105.

#### RESEARCH REFERENCES

**ALR.** Sufficiency of description of terms and conditions of lease, or lease provision, so as to comply with statute of frauds. 12 A.L.R.6th 123.

## CASE NOTES

## ANALYSIS

Assignments.  
Cancellation.  
Sufficiency of Writing.

**Assignments.**

A lease contract for five years containing no provision against assignment may be assigned. *Keith v. McGregor*, 163 Ark. 203, 259 S.W. 725 (1924).

Landlord could not object to assignment of lease executed by wife of tenant on the ground that she did not have authority to execute assignment, since only parties to assignment could object. *Pardue v. Bryant*, 219 Ark. 727, 244 S.W.2d 135 (1951).

Assignment of a lease to a third party by deed meeting all of the requirements of this section, the assignment of such lease was not violative of § 4-59-101. *Jones v. Innkeepers, Inc.*, 12 Ark. App. 364, 676 S.W.2d 761 (1984).

**Cancellation.**

A parol agreement to cancel a lease does not of itself constitute a surrender of the

lease; but when such an agreement has been executed, parol proof thereof may be made. *Ford v. Miller*, 149 Ark. 443, 232 S.W. 604 (1921).

**Sufficiency of Writing.**

Writing held insufficient to create binding lease. *Holt v. Ames*, 240 Ark. 218, 398 S.W.2d 687 (1966).

Execution and acceptance of notes for three years' rent, signed only by the tenant and containing nothing to identify the land leased, were insufficient to create a binding three-year lease, notwithstanding the statute of frauds, such notes might be valid evidence of an oral lease for the first of the three years. *Norton v. Hindsley*, 245 Ark. 966, 435 S.W.2d 788 (1969).

Where lease was in writing, signed by the lessor and lessee, and in all respects complied with § 4-59-101, it was an enforceable contract between those parties. *Jones v. Innkeepers, Inc.*, 12 Ark. App. 364, 676 S.W.2d 761 (1984).

**Cited:** *Jones v. Innkeepers, Inc.*, 12 Ark. App. 364, 676 S.W.2d 761 (1984).

**4-59-103. Trusts or confidences.**

(a)(1) All declarations or creations of trusts or confidences of any lands or tenements shall be manifested and proved by some writing signed by the party who is or shall be by law enabled to declare the trusts, or by his or her last will in writing, or else they shall be void.

(2) All grants and assignments of any trusts or confidences shall be in writing signed by the party granting or assigning them, or by his or her last will in writing, or else they shall be void.

(b) Where any conveyance shall be made of any lands or tenements, by which a trust or confidence may arise or result by implication of law, the trust or confidence shall not be affected by anything contained in this section, § 4-59-102, and § 4-59-201 et seq.

**History.** Rev. Stat., ch. 65, §§ 10, 11; C. §§ 6064, 6065; A.S.A. 1947, §§ 38-106, & M. Dig., §§ 4867, 4868; Pope's Dig., 38-107.

## CASE NOTES

## ANALYSIS

Bases of Trusts.  
Burden of Proof.  
Estoppel.  
Evidence.  
—In General.

—Parol Evidence.  
Express Trusts.  
Fraud.  
Implied Trusts.  
—In General.  
—Constructive Trusts.  
—Resulting Trusts.

Pleading.

Secret Trusts.

Sufficiency of Memorandum.

### **Bases of Trusts.**

A parol agreement that another shall be interested in the purchase of land without the advance of money by the other person, there being no element in case other than that of broken promise to reconvey, cannot be made the basis of a trust, either express or implied. *W.B. Worthen Co. v. Vogler*, 145 Ark. 161, 224 S.W. 626 (1920).

### **Burden of Proof.**

In an action to compel defendant to convey a lot purchased at an execution sale in conformity with an agreement for that purpose, the burden was on the plaintiff to establish a trust *ex maleficio*. *Eason v. Wheeler*, 167 Ark. 320, 268 S.W. 29 (1925).

Burden is upon the party who asserts the existence of a constructive trust based on a parol agreement to establish it by evidence which is clear, cogent and convincing. *Kelly v. Weir*, 243 F. Supp. 588 (E.D. Ark. 1965).

### **Estoppel.**

Wife of farm owner who knew of the agreement of her husband that his brother purchase one half of his land and that the farm be operated as a partnership was estopped to claim the statute of frauds. *White v. White*, 254 Ark. 257, 493 S.W.2d 133 (1973).

### **Evidence.**

#### **—In General.**

An orally created trust cannot be found upon mere preponderance of the evidence but must be established by clear, satisfactory and convincing evidence. *American Bonding Co. v. Hord*, 98 F.2d 350 (8th Cir. 1938).

A resulting trust must be established by evidence that is clear, cogent and convincing. *Harbour v. Harbour*, 207 Ark. 551, 181 S.W.2d 805 (1944).

To engraft resulting trust upon deed absolute in form, evidence must be clear and convincing. *Crain v. Keenan*, 218 Ark. 375, 236 S.W.2d 731 (1951).

Testimony may be sufficient to establish resulting trust in land, even though not undisputed. *Crain v. Keenan*, 218 Ark. 375, 236 S.W.2d 731 (1951).

There must be clear, cogent and convincing evidence of fraud, or a confidential relationship to establish a constructive trust. *Bottenfield v. Wood*, 264 Ark. 505, 573 S.W.2d 307 (1978).

Evidence insufficient to support a finding that there was either an express oral trust or a resulting or constructive trust. *Bottenfield v. Wood*, 264 Ark. 505, 573 S.W.2d 307 (1978).

#### **—Parol Evidence.**

Parol evidence not admissible to establish an express trust, as to an interest in land. *Salysers v. Smith*, 67 Ark. 526, 55 S.W. 936 (1900); *Morris v. Nowlin Lumber Co.*, 100 Ark. 253, 140 S.W. 1 (1911); *Harbour v. Harbour*, 103 Ark. 273, 146 S.W. 867 (1912); *Carpenter v. Gibson*, 104 Ark. 32, 148 S.W. 508 (1912); *Veasey v. Veasey*, 110 Ark. 389, 162 S.W. 45 (1913); *Bray v. Timms*, 162 Ark. 247, 258 S.W. 338 (1924); *Hunt v. Hunt*, 202 Ark. 130, 149 S.W.2d 930 (1941); *Harbour v. Harbour*, 207 Ark. 551, 181 S.W.2d 805 (1944); *Hawkins v. Scanlon*, 212 Ark. 180, 206 S.W.2d 179 (1947).

Parol evidence is admissible to establish a resulting trust. *Lasker-Morris Bank & Trust Co. v. Gans*, 132 Ark. 402, 200 S.W. 1029 (1918); *Bray v. Timms*, 162 Ark. 247, 258 S.W. 338 (1924); *Hunt v. Hunt*, 202 Ark. 130, 149 S.W.2d 930 (1941); *Harbour v. Harbour*, 207 Ark. 551, 181 S.W.2d 805 (1944); *Stewart v. Bowen*, 224 Ark. 275, 273 S.W.2d 540 (1954).

Parol evidence is admissible to establish an implied trust. *Pharr v. Fink*, 151 Ark. 305, 237 S.W. 728 (1922); *Harbour v. Harbour*, 207 Ark. 551, 181 S.W.2d 805 (1944); *Bramlett v. Selman*, 268 Ark. 457, 597 S.W.2d 80 (1980).

A trust in personal property may be created and proved by parol. *Scott v. Miller*, 179 Ark. 7, 13 S.W.2d 819 (1929); *Oliver v. Oliver*, 182 Ark. 1025, 34 S.W.2d 226 (1931).

Parol evidence is admissible to establish a constructive trust. *Harbour v. Harbour*, 207 Ark. 551, 181 S.W.2d 805 (1944); *Bramlett v. Selman*, 268 Ark. 457, 597 S.W.2d 80 (1980).

Parol evidence admissible to establish an express oral trust in personalty. *Hawkins v. Scanlon*, 212 Ark. 180, 206 S.W.2d 179 (1947).

### **Express Trusts.**

This section refers to express trusts. *McDonald v. Tyner*, 84 Ark. 189, 105 S.W.

74 (1907); *Barron v. Stuart*, 136 Ark. 481, 207 S.W. 22 (1918).

Express trust cannot be engrafted on written instrument by parol. *Morris v. Nowlin Lumber Co.*, 100 Ark. 253, 140 S.W. 1 (1911); *Harbour v. Harbour*, 103 Ark. 273, 146 S.W. 867 (1912); *Carpenter v. Gibson*, 104 Ark. 32, 148 S.W. 508 (1912); *Veasey v. Veasey*, 110 Ark. 389, 162 S.W. 45 (1913); *O'Connor v. Patton*, 171 Ark. 626, 286 S.W. 822 (1926); *Umberger v. Westmoreland*, 218 Ark. 632, 238 S.W.2d 495 (1951).

Where a trust in land is sought to be established by the agreement of the parties or from the declaration of the beneficial owner of the property, made to establish a trust, it is within the statute of frauds and must be proved by writing. *Spradling v. Spradling*, 101 Ark. 451, 142 S.W. 848 (1911); *Pharr v. Fink*, 151 Ark. 305, 237 S.W. 728 (1922); *Hawkins v. Scanlon*, 212 Ark. 180, 206 S.W.2d 179 (1947).

To establish an express trust it is necessary to show that before or after the time land was purchased, the one holding title thereto executed and delivered some writing declaring that he held it in trust. *Stacy v. Stacy*, 175 Ark. 763, 300 S.W. 437 (1927).

Invalidity of an express trust agreement, clearly established, does not convert a transfer into a gift where such transfer was not intended to be a gift, but an oral agreement and surrounding circumstances will be taken into consideration and where a breach of the fiduciary obligation is shown, restitution will be enforced. *American Bonding Co. v. Hord*, 98 F.2d 350 (8th Cir. 1938).

An express trust can be proved only by some instrument in writing signed by the party enabled by law to declare the trust. *Hunt v. Hunt*, 202 Ark. 130, 149 S.W.2d 930 (1941).

Suit to impress trust on realty which was conveyed from aunt to nephews on ground that grantees agreed to hold land as trustees was an effort to establish an express trust by oral evidence and within the interdiction of this section. *Jones v. Gachot*, 217 Ark. 462, 230 S.W.2d 937 (1950).

Where both parties admit the existence of the oral agreement which constituted the express trust it prevents the application of the statute of frauds to an express

oral trust of an interest in land. *Arnett v. Lillard*, 245 Ark. 939, 436 S.W.2d 106 (1969).

A quitclaim deed, signed by the grantor, but giving no instructions to the grantees, fails as an express trust. *Bottenfield v. Wood*, 264 Ark. 505, 573 S.W.2d 307 (1978).

### **Fraud.**

A mere refusal to perform a parol agreement, void under the statute of frauds, is not of itself fraud. *Davidson v. Edwards*, 168 Ark. 306, 270 S.W. 94 (1925).

Where there is fraud in procuring conveyance, though absolute upon its face, it may be shown to create a trust. *O'Connor v. Patton*, 171 Ark. 626, 286 S.W. 822 (1926).

### **Implied Trusts.**

#### **—In General.**

The term "implied trusts," includes resulting and constructive trusts, they arise by implication of law and may be established by parol testimony. *Stacy v. Stacy*, 175 Ark. 763, 300 S.W. 437 (1927).

A trust created by a purchase of land at a mortgage foreclosure sale by one to whom money was furnished by mortgagor and his wife, without any instrument in writing, was an implied trust, since an implied trust includes a resulting trust. *Hunt v. Hunt*, 202 Ark. 130, 149 S.W.2d 930 (1941).

A constructive trust may be imposed despite the statute of frauds, because implied trusts, such as constructive trusts or resulting trusts, are specifically exempted from the application of this section. *Cole v. Rivers*, 43 Ark. App. 123, 861 S.W.2d 551 (1993).

#### **—Constructive Trusts.**

The rule that a mere verbal agreement by which one party thereto promises to buy in at a judicial sale lands of the other party and to hold the same for his benefit does not create a constructive trust, the agreement being within the statute of frauds, is subject to the exception that where the purchaser buys lands of another, under such a state of facts as would make it a fraud to permit him to hold on to his bargain, a trust will be raised. *Strasner v. Carroll*, 125 Ark. 34, 187 S.W. 1057 (1916).

Oral transaction held to create a constructive trust to which the statute of

frauds did not apply. *Edlin v. Moser*, 176 Ark. 1107, 5 S.W.2d 923 (1928); *Armstrong v. Armstrong*, 181 Ark. 597, 27 S.W.2d 88 (1930); *Walker v. Biddle*, 225 Ark. 654, 284 S.W.2d 840 (1955); *Davidson v. Sanders*, 235 Ark. 161, 357 S.W.2d 510 (1962); *White v. White*, 254 Ark. 257, 493 S.W.2d 133 (1973); *Bramlett v. Selman*, 268 Ark. 457, 597 S.W.2d 80 (1980).

This section does not apply to a constructive trust between mother and daughter. *Grissom v. Bunch*, 227 Ark. 696, 301 S.W.2d 462 (1957).

Proof of fraud is not essential to the establishment of a constructive trust. *Davidson v. Sanders*, 235 Ark. 161, 357 S.W.2d 510 (1962).

Before a constructive trust will be declared it must appear either that the promisor who later obtains title to the property never intended to perform his promise, or that there was a confidential relationship between the promisor and promisee. *Kelly v. Weir*, 243 F. Supp. 588 (E.D. Ark. 1965).

A constructive trust on lands may be based upon a parol agreement. *Kelly v. Weir*, 243 F. Supp. 588 (E.D. Ark. 1965).

Simply because the grantees were related to the grantor could not, alone, create a confidential relationship imposing a constructive trust on the land. *Bottenfield v. Wood*, 264 Ark. 505, 573 S.W.2d 307 (1978).

Although a grantee's oral promise to hold the title to land for a third person is unenforceable, a constructive trust will be imposed if it is shown by clear, cogent and convincing evidence that the grantee's promise was intentionally fraudulent or that the parties were in a confidential relationship. *Bramlett v. Selman*, 268 Ark. 457, 597 S.W.2d 80 (1980).

### —Resulting Trusts.

Where title to land purchased and paid for by a minor son was taken by his father on account of the son's supposed incapacity to take title, an express oral agreement of the father to hold as trustee for the son did not change the nature of the transaction from a resulting trust to an express trust which would be within the statute of frauds. *Grayson v. Bowlin*, 70 Ark. 145, 66 S.W. 658 (1902).

Transactions between the parties subsequent to the purchase of certain lands cannot create a resulting trust, but if such

a trust arises out of the purchase of the land, its character as a resulting trust is not altered by a writing subsequently executed, which acknowledges the existence of the trust; nor does the fact the writing acknowledges the existence of the trust change the character of the transaction from a resulting trust which may be established by parol to an express trust which is within the statute of frauds. *Lasker-Morris Bank & Trust Co. v. Gans*, 132 Ark. 402, 200 S.W. 1029 (1918).

Resulting trust, exempt from this section, held to be established. *Davis v. Dickerson*, 137 Ark. 14, 207 S.W. 436 (1918); *Lisko v. Hicks*, 195 Ark. 705, 114 S.W.2d 9 (1938); *Harbour v. Harbour*, 207 Ark. 551, 181 S.W.2d 805 (1944); *Crain v. Keenan*, 218 Ark. 375, 236 S.W.2d 731 (1951); *Gorenflo v. Brown*, 233 Ark. 221, 343 S.W.2d 564 (1961).

A parol agreement that another shall be interested in the purchase of lands or a parol declaration by a purchaser that he buys for another without an advance of money by that other falls within the statute of frauds and cannot give birth to a resulting trust. *Roberts v. Pratt*, 147 Ark. 575, 228 S.W. 379 (1921).

Wife may show by oral testimony that her money went into purchase of land held in husband's name, that she had a beneficial interest therein, so as to establish a resulting trust. *Harbour v. Harbour*, 207 Ark. 551, 181 S.W.2d 805 (1944).

Resulting trusts, such as that created when a husband purchases property with his cash in his wife's name because he believes that he is dying, with the understanding that if he lives the deed will be reformed to create an estate by the entirety, but where the wife dies soon afterward, are excepted from the statute of frauds and may be established by parol evidence. *Phillips v. Tramble*, 224 Ark. 359, 273 S.W.2d 400 (1954).

A resulting trust arises in one of the following situations: where a private or charitable trust fails in whole or in part; where a private or charitable trust is fully performed without exhausting the trust estate; and, where property is purchased and the purchase price is paid by one person and at his direction the vendor transfers the property to another person. *Bottenfield v. Wood*, 264 Ark. 505, 573 S.W.2d 307 (1978).

**Pleading.**

This section is not applicable where neither party, in the trial below, pleaded or relied on the statute of frauds as a basis for affirmative relief or as a defense. *Arnett v. Lillard*, 245 Ark. 939, 436 S.W.2d 106 (1969).

**Secret Trusts.**

There is a strong presumption against the existence of any secret orally created trust. *American Bonding Co. v. Hord*, 98 F.2d 350 (8th Cir. 1938).

**Sufficiency of Memorandum.**

Memorandum which was susceptible to several interpretations was not clear, unequivocal and convincing evidence which was required to show that husband's deed to his subsequently deceased wife was mere mortgage, where husband's testimony relating to transaction was indefinite. *Umberger v. Westmoreland*, 218 Ark. 632, 238 S.W.2d 495 (1951).

**Cited:** *Payne v. Box*, 231 Ark. 301, 329 S.W.2d 181 (1959).

**SUBCHAPTER 2 — FRAUDULENT TRANSFERS****SECTION.**

- 4-59-201. Definitions.
- 4-59-202. Insolvency.
- 4-59-203. Value.
- 4-59-204. Transfers fraudulent as to present and future creditors.
- 4-59-205. Transfers fraudulent as to present creditors.
- 4-59-206. When transfer is made or obligation is incurred.
- 4-59-207. Remedies of creditors.

**SECTION.**

- 4-59-208. Defenses, liability, and protection of transferee.
- 4-59-209. Extinguishment of cause of action.
- 4-59-210. Supplementary provisions.
- 4-59-211. Uniformity of application and construction.
- 4-59-212. Short title.
- 4-59-213. Repeal.

**Publisher's Notes.** Former subchapter 2, concerning fraudulent conveyances, was repealed by Acts 1987, No. 967, § 13. The former subchapter was derived from the following sources:

4-59-201. Rev. Stat., ch. 65, § 7; C. & M. Dig., § 4879; Pope's Dig., § 6076; A.S.A. 1947, § 68-1307.

4-59-202. Rev. Stat., ch. 65, § 6; C. & M. Dig., § 4878; Pope's Dig., § 6075; A.S.A. 1947, § 68-1306.

4-59-203. Rev. Stat., ch. 65, § 1; C. & M. Dig., § 4873; Pope's Dig., § 6070; A.S.A. 1947, § 68-1301.

4-59-204. Rev. Stat., ch. 65, §§ 2, 3; C. & M. Dig., §§ 4874, 4875; Pope's Dig., §§ 6071, 6072; A.S.A. 1947, §§ 68-1302, 68-1303.

4-59-205. Rev. Stat., ch. 65, § 4; C. & M. Dig., § 4876; Pope's Dig., § 6073; A.S.A. 1947, § 68-1304.

4-59-206. Acts 1965 (1st Ex. Sess.), No. 24, § 1; A.S.A. 1947, § 68-1309.

4-59-207. Rev. Stat., ch. 65, § 5; C. & M. Dig., § 4877; Pope's Dig., § 6074; A.S.A. 1947, § 68-1305.

4-59-208. Acts 1887, No. 99, § 1, p. 193; C. & M. Dig., §§ 4367, 4880; Pope's Dig., §§ 5379, 6077; A.S.A. 1947, § 68-1308.

Acts 1993, No. 444, § 2, provided: "The General Assembly determines that Arkansas Code § 4-25-104 is no longer necessary and should be repealed as to dissolution of insolvent corporations is now comprehensively covered by Arkansas Code §§ 4-26-1108, 4-27-1430, and 4-59-201 et seq."

For Commentary regarding the Uniform Fraudulent Transfer Act, see Commentaries Volume A.

**Cross References.** Insolvent corporations, preferences, §§ 4-26-1108 and 4-27-1430.

## RESEARCH REFERENCES

**ALR.** Rule denying recovery of property to one who conveyed to defraud creditors as applicable where the claim which motivated the conveyance was never established. 6 A.L.R.4th 862.

Right of secured creditor to have set aside fraudulent transfer of other property by his debtor. 8 A.L.R.4th 1123.

Sufficiency of showing, in establishing boundary by parol agreement, that boundary was uncertain or in dispute before agreement. 74 A.L.R.4th 132.

**Am. Jur.** 37 Am. Jur. 2d, Fraud. Conv., § 1 et seq.

**Ark. L. Notes.** Flaccus, Baby Needs New Shoes: Child Support Collection and Bankruptcy, 1990 Ark. L. Notes 51.

**Ark. L. Rev.** Equity — Clean-Up Doctrine — Tort Claims for Damages Appended to Suit to Restrain Fraudulent Conveyances (John P. Cobb), 18 Ark. L. Rev. 172.

Fraudulent Conveyances in Arkansas, 19 Ark. L. Rev. 149.

Notes, McCune v. Brown, Allowing a Fraudulent Conveyer to Revoke a "Gift" Despite Unclean Hands, 38 Ark. L. Rev. 446.

Scott, The Revocable-Irrevocable Trust — The Way Out?, 42 Ark. L. Rev. 713.

Comment, Recent Applications of the Arkansas Fraudulent Transfer Act, 51 Ark. L.Rev. 489.

**C.J.S.** 37 C.J.S. Fraud. Conv., § 2 et seq.

**U. Ark. Little Rock L.J.** Note, Debtor—Creditor Relations—Arkansas Fraudulent Transfer Act, 10 U. Ark. Little Rock L.J. 497.

Survey—Debtor—Creditor, 10 U. Ark. Little Rock L.J. 573.

Hardin, Conversion of Nonexempt Property to Exempt Property on the Eve of Bankruptcy in Arkansas, 10 U. Ark. Little Rock L.J. 719.

## 4-59-201. Definitions.

As used in this subchapter, unless the context otherwise requires:

(1) "Affiliate" means:

(i) a person who directly or indirectly owns, controls, or holds with power to vote, twenty percent (20%) or more of the outstanding voting securities of the debtor, other than a person who holds the securities:

(A) as a fiduciary or agent without sole discretionary power to vote the securities; or

(B) solely to secure a debt, if the person has not exercised the power to vote;

(ii) a corporation twenty percent (20%) or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the debtor or a person who directly or indirectly owns, controls, or holds, with power to vote, twenty percent (20%) or more of the outstanding voting securities of the debtor, other than a person who holds the securities:

(A) as a fiduciary or agent without sole power to vote the securities; or

(B) solely to secure a debt, if the person has not in fact exercised the power to vote;

(iii) a person whose business is operated by the debtor under a lease or other agreement, or a person substantially all of whose assets are controlled by the debtor; or

(iv) a person who operates the debtor's business under a lease or other agreement or controls substantially all of the debtor's assets.

(2) "Asset" means property of a debtor, but the term does not include:

(i) property to the extent it is encumbered by a valid lien;

(ii) property to the extent it is generally exempt under nonbankruptcy law; or

(iii) an interest in property held in tenancy by the entirety to the extent it is not subject to process by a creditor holding a claim against only one (1) tenant.

(3) "Claim" means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

(4) "Creditor" means a person who has a claim.

(5) "Debt" means liability on a claim.

(6) "Debtor" means a person who is liable on a claim.

(7) "Insider" includes:

(i) if the debtor is an individual:

(A) a relative of the debtor or of a general partner of the debtor;

(B) a partnership in which the debtor is a general partner;

(C) a general partner in a partnership described in clause (B); or

(D) a corporation of which the debtor is a director, officer, or person in control;

(ii) if the debtor is a corporation:

(A) a director of the debtor;

(B) an officer of the debtor;

(C) a person in control of the debtor;

(D) a partnership in which the debtor is a general partner;

(E) a general partner in a partnership described in clause (D); or

(F) a relative of a general partner, director, officer, or person in control of the debtor;

(iii) if the debtor is a partnership:

(A) a general partner in the debtor;

(B) a relative of a general partner in, a general partner of, or a person in control of the debtor;

(C) another partnership in which the debtor is a general partner;

(D) a general partner in a partnership described in clause (C); or

(E) a person in control of the debtor;

(iv) an affiliate, or an insider of an affiliate as if the affiliate were the debtor; and

(v) a managing agent of the debtor.

(8) "Lien" means a charge against or an interest in property to secure payment of a debt or performance of an obligation, and includes a security interest created by agreement, a judicial lien obtained by legal or equitable process or proceedings, a common-law lien, or a statutory lien, including child support liens arising under §§ 9-14-230 and 9-14-231.

(9) "Person" means an individual, partnership, corporation, association, organization, government or governmental subdivision or agency, business trust, estate, trust, or any other legal or commercial entity.

(10) "Property" means anything that may be the subject of ownership.

(11) "Relative" means an individual related by consanguinity within the third degree as determined by the common law, a spouse, or an individual related to a spouse within the third degree as so determined, and includes an individual in an adoptive relationship within the third degree.

(12) "Transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance.

(13) "Valid lien" means a lien that is effective against the holder of a judicial lien subsequently obtained by legal or equitable process or proceedings.

**History.** Acts 1987, No. 967, § 1; 1997, No. 1296, § 1.

## RESEARCH REFERENCES

**Ark. L. Rev.** Carroll, Uniform Laws in Arkansas, 52 Ark. L. Rev. 313.

## CASE NOTES

### ANALYSIS

**Applicability.**  
**Insider.**

### **Applicability.**

Since creditor could enforce his judgment with a remedy of a resulting trust, the district court erred in finding that his claim was time-barred by the Arkansas Fraudulent Transfers Act, § 4-59-201 et seq.; the allegations were sufficient to argue that a resulting trust was formed, and the creditor, who was entitled to step into the debtor's shoes, timely filed his claim within the 10 years for enforcing a judgment pursuant to § 16-56-114 against defendant, the trustee/title holder of real property held for the benefit of the debtor. *Imperato v. McMinn*, 406 F.3d 987 (8th Cir. 2005).

### **Insider.**

Motion for judgment notwithstanding the verdict was denied in a case involving fraudulent transfers to a wife, as an insider, by a judgment debtor under § 4-59-204(a)(1) because the debtor and the wife were unable to substantiate the claim that wife purchased the stocks with money won at a horse race or that a transfer was due to the debtor's poor health. *Laird v. Weigh Sys. South II, Inc.*, 98 Ark. App. 393, 255 S.W.3d 900 (2007).

**Cited:** *Halliburton Co. v. E.H. Owen Family Trust*, 28 Ark. App. 314, 773 S.W.2d 453 (1989); *FDIC v. Bell*, 106 F.3d 258 (8th Cir. 1997); *United States Fid. & Guar. Co. v. Hogan*, 208 B.R. 459 (Bankr. E.D. Ark. 1997).

**4-59-202. Insolvency.**

(a) A debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets at a fair valuation.

(b) A debtor who is generally not paying his or her debts as they become due is presumed to be insolvent.

(c) A partnership is insolvent under subsection (a) of this section if the sum of the partnership's debts is greater than the aggregate, at a fair valuation, of all of the partnership's assets and the sum of the excess of the value of each general partner's nonpartnership assets over the partner's nonpartnership debts.

(d) Assets under this section do not include property that has been transferred, concealed, or removed with intent to hinder, delay, or defraud creditors or that has been transferred in a manner making the transfer voidable under this subchapter.

(e) Debts under this section do not include an obligation to the extent it is secured by a valid lien on property of the debtor not included as an asset.

**History.** Acts 1987, No. 967, § 2.

**4-59-203. Value.**

(a) Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied, but value does not include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or other person.

(b) For the purpose of §§ 4-59-204(a)(2) and 4-59-205, a person gives a reasonably equivalent value if the person acquires an interest of the debtor in an asset pursuant to a regularly conducted, noncollusive foreclosure sale or execution of a power of sale for the acquisition or disposition of the interest of the debtor upon default under a mortgage.

(c) A transfer is made for present value if the exchange between the debtor and the transferee is intended by them to be contemporaneous and is in fact substantially contemporaneous.

**History.** Acts 1987, No. 967, § 3.

**CASE NOTES****ANALYSIS**

Burden of Proof.

Consideration.

Fraud.

Subsequent Creditors.

**Burden of Proof.**

Every gift is presumptively fraudulent as to existing creditors, and the burden is

on the donee to show that donor's intentions were innocent and that he had abundant means left to pay his debt. *Norton v. Elk Horn Bank*, 55 Ark. 59, 17 S.W. 362 (1891) (decision under prior law).

**Consideration.**

A party claiming under a deed which is attacked as fraudulent cannot support it by showing a different consideration than

that expressed on its face. *Carmack v. Lovett*, 44 Ark. 180 (1884) (decision under prior law).

A wife's relinquishment of dower, or her cession of any other rights of property, is a sufficient consideration for a settlement upon her by her husband out of his own property. *Hershy v. Latham*, 46 Ark. 542 (1885) (decision under prior law).

Consideration of blood or love and affection are not sufficient to support a promise to make a gift in the future. *Stiff v. W.B. Worthen Co.*, 176 Ark. 585, 3 S.W.2d 316 (1928) (decision under prior law).

A gift inter vivos cannot be made to take effect in the future, as such a transaction would only be a promise or agreement to make a gift, and, being without consideration, would be unenforceable and void. *Krickerberg v. Hoff*, 201 Ark. 63, 143 S.W.2d 560 (1940) (decision under prior law).

Gifts and conveyances not for good consideration. *Smith v. Clark*, 219 Ark. 751, 244 S.W.2d 776 (1952); *Burks v. Burks*, 222 Ark. 97, 257 S.W.2d 369 (1953); *Schneider v. O'Neal*, 243 F.2d 914 (8th Cir. 1957) (preceding decisions under prior law).

#### **Fraud.**

That a gift is binding on the donor will not preclude his creditors from attacking

it for fraud. *Norton v. Elk Horn Bank*, 55 Ark. 59, 17 S.W. 362 (1891) (decision under prior law).

Where the bankruptcy court determined that a spendthrift provision in a trust was invalid as to a debtor such that the entire trust corpus was included in his bankruptcy estate and the debtor did not object to this determination at trial, the debtor's subsequent argument, on a motion to alter and amend that the Chapter 7 trustee was required to file a fraudulent conveyance action to set aside the debtor's transfer of assets into the trust was without merit; because the debtor's interest in the entire trust corpus was already included in his bankruptcy estate, the trustee had no reason to attempt to set aside the entire trust as a fraudulent transfer. *In re Schultz*, 324 B.R. 722 (Bankr. E.D. Ark. 2005).

#### **Subsequent Creditors.**

A conveyance by one who is not indebted cannot be attacked by a subsequent creditor as fraudulent because it was voluntary. *Stix v. Chaytor*, 55 Ark. 116, 17 S.W. 707 (1891) (decision under prior law).

**Cited:** *Halliburton Co. v. E.H. Owen Family Trust*, 28 Ark. App. 314, 773 S.W.2d 453 (1989); *Brown v. Brown*, 265 B.R. 167 (Bankr. E.D. Ark. 2001).

### **4-59-204. Transfers fraudulent as to present and future creditors.**

(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(1) with actual intent to hinder, delay, or defraud any creditor of the debtor; or

(2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

(i) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(ii) intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

(b) In determining actual intent under subdivision (a)(1) of this section, consideration may be given, among other factors, as to whether:

(1) the transfer or obligation was to an insider;

- (2) the debtor retained possession or control of the property transferred after the transfer;
- (3) the transfer or obligation was disclosed or concealed;
- (4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
- (5) the transfer was of substantially all the debtor's assets;
- (6) the debtor absconded;
- (7) the debtor removed or concealed assets;
- (8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
- (9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
- (10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and
- (11) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

**History.** Acts 1987, No. 967, § 4.

## RESEARCH REFERENCES

**Ark. L. Rev.** Note: Middleton v. Lockhart: Rule 41(b), a Fraudulent Transfer, a Homestead, and a Homicide — Did This Hard Case Make Bad Law?, 56 Ark. L. Rev. 113.

**U. Ark. Little Rock L.J.** Note, Bankruptcy — A Fraudulent Conveyance Action and a Lis Pendens May Create a Lien Which Survives a Bankruptcy Discharge, 15 U. Ark. Little Rock L.J. 319.

## CASE NOTES

### ANALYSIS

In General.  
 Applicability.  
 Assignments.  
 Bankruptcy Proceedings.  
 Divorce Proceedings.  
 Divorce property settlement.  
 Estoppel.  
 Exemptions.  
 Federal Law.  
 Fraudulent Intent.  
 —In General.  
 —Adequacy of Consideration.  
 —Debtor's Retention of Property.  
 —Indebtedness or Insolvency.  
 —Pendency or Threat of Litigation.  
 —Proof.  
 Gambling Debt.  
 Good-Faith Purchasers.  
 Leases.  
 Miscellaneous Transfers.  
 Parol Evidence.  
 Protected Parties.

Purchasers.  
 Remedies.  
 Spouses.  
 Transfer to Creditors.  
 Value.

### In General.

Conveyances or legal actions to defraud creditors. Davis v. Cramer, 133 Ark. 224, 202 S.W. 239 (1918); Scrape v. Robinson, 202 Ark. 264, 149 S.W.2d 943 (1941); Spitzer v. Barnhill, 237 Ark. 525, 374 S.W.2d 811 (1964); United States v. Johnston, 245 F. Supp. 433 (W.D. Ark. 1965); Rees v. Craighead Inv. Co., 251 Ark. 336, 472 S.W.2d 92 (1971); Udey v. District Dir., I.R.S., 534 F. Supp. 219 (W.D. Ark. 1982); In re Locke, 50 B.R. 443 (Bankr. E.D. Ark. 1985) (preceding decisions under prior law).

### Applicability.

Former statute, concerning gifts and conveyances in trust to use of person making, held might not apply to creditors of a

stockholder in a corporation. *A.H. Scoggin & Co. v. City Nat'l Bank*, 175 Ark. 461, 299 S.W. 1033 (1927) (decision under prior law).

### **Assignments.**

The assignee in a fraudulent assignment is chargeable with notice of its contents. *Hunt v. Weiner*, 39 Ark. 70 (1882) (decision under prior law).

### **Bankruptcy Proceedings.**

If transfers by bankrupt were in fraud of any of the bankrupt's creditors and avoidable as to them, the trustee in bankruptcy would be entitled to judgment against transferee for property wrongfully transferred. *Schneider v. O'Neal*, 243 F.2d 914 (8th Cir. 1957) (decision under prior law).

The open conversion of nonexempt assets into exempt assets was not considered fraudulent as this practice has been long permitted under the bankruptcy code. *Federal Sav. & Loan Ins. Corp. v. Holt*, 97 B.R. 997 (W.D. Ark. 1988), *aff'd*, *Federal Sav. & Loan Ins. Co. v. Holt*, 894 F.2d 1005 (8th Cir. 1990) (decision under prior law).

To prove a fraudulent transfer under this section, the trustee must show that the debtor received less than reasonably equivalent value for the property and that he was insolvent on the date of the transfer or became insolvent as a result of the transfer. *Williams v. Marlar*, 246 B.R. 606 (Bankr. W.D. Ark. 2000), *aff'd*, *Williams v. Marlar* (In re Marlar), 252 B.R. 743 (B.A.P. 8th Cir. 2000).

Where corporation gave a promissory note to a trust in exchange for a physician's interest in his practice (the physician previously transferred his interest to the trust), the debtor's payments on the note were fraudulent transfers because the debtor received no value for the payments and the corporation never transferred the physician's interest to the debtor. *Meeks v. Healthcorp of Tenn., Inc.* (In re Southern Health Care of Ark.), 299 B.R. 918 (Bankr. E.D. Ark. 2003), *aff'd*, *Meeks v. Don Howard Charitable Remainder Trust* (In re S. Health Care of Ark., Inc.), 309 B.R. 314 (B.A.P. 8th Cir. 2004).

### **Divorce Proceedings.**

Transfer held fraudulent as to creditor bank, where debtor husband, after transferring business assets to his ex-wife, re-

tained considerably less assets than he transferred to the wife, and thus did not receive the reasonably equivalent value for the transferred property. *FDIC v. Bell*, 106 F.3d 258 (8th Cir. 1997), *cert. denied*, *Hewlett-Packard Co. v. Repeat-O-Type Stencil Mfg. Corp.*, 523 U.S. 1022, 118 S. Ct. 1304, 140 L. Ed. 2d 470 (1998).

### **Divorce property settlement.**

In a federal diversity action by a judgment creditor to recover fraudulently transferred assets, the district court was under no obligation to consider that a state court approved a property settlement agreement as equally dividing the divorcing parties' assets. *FDIC v. Bell*, 106 F.3d 258 (8th Cir. 1997), *cert. denied*, *Hewlett-Packard Co. v. Repeat-O-Type Stencil Mfg. Corp.*, 523 U.S. 1022, 118 S. Ct. 1304, 140 L. Ed. 2d 470 (1998).

### **Estoppel.**

Where a wife permitted her husband to retain title to her land knowing that his creditors were dealing with him under the belief that it belonged to him, she was estopped as to them to claim it as hers, and a conveyance by the husband to the wife to prevent its seizure by his creditors was fraudulent and void. *Cowling v. Hill*, 69 Ark. 350, 63 S.W. 800 (1901) (decision under prior law).

Evidence sufficient to find that creditor was estopped from maintaining that the transfer of the property was fraudulent. *A.H. Scoggin & Co. v. City Nat'l Bank*, 175 Ark. 461, 299 S.W. 1033 (1927) (decision under prior law).

### **Exemptions.**

Creditors cannot set aside as fraudulent a conveyance by their debtor of his homestead. *Stanley v. Snyder*, 43 Ark. 429 (1884); *Carmack v. Lovett*, 44 Ark. 180 (1884); *Gray v. Patterson*, 65 Ark. 373, 46 S.W. 730 (1898); *White Sewing-Machine Co. v. Wooster*, 66 Ark. 382, 50 S.W. 1000 (1899); *Sieb's Hatcheries, Inc. v. Lindley*, 111 F. Supp. 705 (W.D. Ark. 1953), *aff'd*, 209 F.2d 674 (8th Cir. 1954) (preceding decisions under prior law).

Creditors cannot set aside as fraudulent a conveyance of the debtor's personal property less than the value that he could claim as exempt. *Sannoner v. King*, 49 Ark. 299, 5 S.W. 327 (1887); *Simms v. Phillips*, 54 Ark. 193, 15 S.W. 461 (1891) (preceding decisions under prior law).

In a suit by creditors of an insolvent debtor to subject land which he had fraudulently procured to be conveyed to his wife, it was no defense that the consideration for the land was the exchange of the debtor's homestead. *Reeves v. Slade*, 71 Ark. 611, 77 S.W. 54 (1903) (decision under prior law).

### **Federal Law.**

Federal courts use the same factors as Arkansas courts to determine whether transfers were made with fraudulent intent. *United States Fid. & Guar. Co. v. Hogan*, 208 B.R. 459 (Bankr. E.D. Ark. 1997).

### **Fraudulent Intent.**

United States' request to set aside a conveyance of real property by a taxpayer and his wife to their private trust was granted because the conveyance was fraudulent under subdivision (a)(1) of this section: (1) the conveyance was made shortly after the taxpayer received his first notice of assessment from the Internal Revenue Service; (2) the \$10 that the trust purportedly paid for the property was grossly disproportionate to its value; (3) the taxpayer and his wife continued to live on the property without the benefit of a lease and without paying any rent to the trust; and (4) the taxpayer and his wife continued to pay all of the expenses connected with the property, including mortgage and property tax payments. *United States v. Tolbert*, — F. Supp. 2d —, 2007 U.S. Dist. LEXIS 68041 (W.D. Ark. Sept. 13, 2007), *aff'd*, — F.3d —, 2009 U.S. App. LEXIS 12455 (8th Cir. June 10, 2009).

Taxpayer fraudulently transferred his acreage and his home to his sons and other purchasers under subdivision (a)(1) of this section for inadequate consideration of \$1 and \$10 after becoming aware of his tax liability because the properties were transferred to entities controlled by the taxpayer and consisted of substantially all of his assets, the taxpayer never moved out of his home, and the purchasers did not believe that they owned the home, did not finish paying for it, and had no knowledge that they conveyed it to a foundation that was an alter ego of the taxpayer who controlled its bank account. *United States v. Muncy*, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 37343 (E.D. Ark. May 7, 2008).

### **—In General.**

Intent that makes a conveyance fraudulent as to creditors must be participated in by both parties, grantor and grantee. *Bank of Sun Prairie v. Hovig*, 218 F. Supp. 769 (W.D. Ark. 1963) (decision under prior law).

Indicia of fraudulent intent include insolvency or indebtedness of the transferor, inadequate or fictitious consideration, retention by the debtor of the property, pendency or threat of litigation, secrecy or concealment, and fact that disputed transactions were conducted in a manner differing from the usual business practice. *Bank of Sun Prairie v. Hovig*, 218 F. Supp. 769 (W.D. Ark. 1963); *Tipp v. United Bank*, 23 Ark. App. 176, 745 S.W.2d 141 (1988) (preceding decisions under prior law); *Clark v. Bank of Bentonville*, 308 Ark. 241, 824 S.W.2d 358 (1992) (decision under prior law).

Fraudulent intent was necessary to bring a conveyance within the purview of former statute. *Tipp v. United Bank*, 23 Ark. App. 176, 745 S.W.2d 141 (1988) (decision under prior law); *Clark v. Bank of Bentonville*, 308 Ark. 241, 824 S.W.2d 358 (1992) (decision under prior law).

Both vendor and vendee must act with fraudulent intent before conveyance will be regarded as fraudulent. *Tipp v. United Bank*, 23 Ark. App. 176, 745 S.W.2d 141 (1988).

### **—Adequacy of Consideration.**

Where a debtor conveyed his property to his son and to a family-owned corporation, there was a presumption of fraud casting upon him the burden of showing a consideration, and the deed's recitals were not competent to show a consideration. *Leonhard v. Flood*, 68 Ark. 162, 56 S.W. 781 (1900) (decision under prior law).

The assignment by an embarrassed debtor to his brother-in-law of his interest under his uncle's will, although it expressed a consideration, was void as to existing creditors where there was no evidence offered that the stated consideration was, in fact, paid. *Wasson v. Greig*, 194 Ark. 420, 108 S.W.2d 463 (1937) (decision under prior law).

Transactions between husband and wife are closely scrutinized for fraud, but when made in good faith for a fair consideration they are upheld the same as transactions between strangers. *Sieb's Hatcheries, Inc.*

v. Lindley, 111 F. Supp. 705 (W.D. Ark. 1953), *aff'd*, 209 F.2d 674 (8th Cir. 1954) (decision under prior law).

Where the husband conveys to the wife certain property without consideration, such transaction will be deemed fraudulent as to a prior creditor, though no actual fraud was intended. *Sieb's Hatcheries, Inc. v. Lindley*, 111 F. Supp. 705 (W.D. Ark. 1953), *aff'd*, 209 F.2d 674 (8th Cir. 1954) (decision under prior law).

In determining whether the consideration in an alleged fraudulent transfer of property is adequate, inadequate or grossly inadequate, conveyance by a debtor to a third party of mortgaged property is supported by adequate consideration if the third party grantee agrees to pay debts owed by grantor which are secured by the property. *Bank of Sun Prairie v. Hovig*, 218 F. Supp. 769 (W.D. Ark. 1963) (decision under prior law).

Under the evidence, in action to set aside alleged fraudulent transfer of property, consideration for the conveyance as a matter of law appeared adequate, and, if there was any disparity at all between consideration and value received by transferee, it was slight and far from being "grossly inadequate." *Bank of Sun Prairie v. Hovig*, 218 F. Supp. 769 (W.D. Ark. 1963) (decision under prior law).

In determining fraudulent intent on the part of the parties to a transaction, mere inadequacy of price for consideration is insufficient; it is only when the inadequacy of price is so gross that it shocks the conscience, and furnishes satisfactory and decisive evidence of fraud, that it will be sufficient proof that the purchase is not bona fide. *Ouachita Elec. Coop. Corp. v. Evans-St. Clair*, 12 Ark. App. 171, 672 S.W.2d 660 (1984) (decision under prior law).

For a transfer to withstand attack as fraudulent, it must be for adequate consideration and made in good faith. In re *Baugh*, 60 B.R. 102 (Bankr. E.D. Ark. 1986) (decision under prior law).

#### —Debtor's Retention of Property.

A mortgage of articles of merchandise left in possession of mortgagor with power to sell in ordinary course of business was void except as between the parties. *Lund v. Fletcher*, 39 Ark. 325 (1882); *Martin v. Ogden*, 41 Ark. 186 (1883); *Fink v. Ehrman Bros.*, 44 Ark. 310 (1884); *Gauss*

*Sons v. Doyle & Co.*, 46 Ark. 122 (1885); *Collins v. Lightle*, 50 Ark. 97, 6 S.W. 596 (1887); *Felner v. Wilson*, 55 Ark. 77, 17 S.W. 587 (1891); *Adler-Goldman Comm'n Co. v. Phillips*, 63 Ark. 40, 37 S.W. 297 (1896) (preceding decisions under prior law).

Where certain goods were sold to customer but not separated from other goods in store although entered on its books and thereafter entire stock of store was mortgaged to another, such sale was invalid as against subsequent purchasers and attaching creditors. *Davis v. Meyer*, 47 Ark. 210, 1 S.W. 95 (1886) (decision under prior law).

The continuance of the vendor in the possession of the goods after the sale was prima facie evidence of a secret trust, fraudulent as to creditors, and the burden of proof was upon the vendee to overcome the presumption of fraud arising from such possession by proving the payment of a sufficient consideration to support the sale. *Valley Distilling Co. v. Atkins*, 50 Ark. 289, 7 S.W. 137 (1887) (decision under prior law).

Failure to make actual delivery raises only a rebuttable presumption of fraud. *Shaul v. Harrington*, 54 Ark. 305, 15 S.W. 835 (1891) (decision under prior law).

Where there is a completed contract of sale and an agreement by the vendor to hold as bailee for the vendee in lieu of actual delivery, the sale is valid against the vendor's creditors if it is not otherwise fraudulent. *Shaul v. Harrington*, 54 Ark. 305, 15 S.W. 835 (1891) (decision under prior law).

Where mortgagors hold possession of goods and make sales as agents of mortgagees, the mortgage is valid. *Felner v. Wilson*, 55 Ark. 77, 17 S.W. 587 (1891); *Adler-Goldman Comm'n Co. v. Phillips*, 63 Ark. 40, 37 S.W. 297 (1896) (preceding decisions under prior law).

Where vendors, charged with fraudulent transfer, remained on the premises as managers of tourist accommodations on the land did not affect the transaction, since their corporate employer could terminate their position at any time. *Bank of Sun Prairie v. Hovig*, 218 F. Supp. 769 (W.D. Ark. 1963) (decision under prior law).

Evidence that debtor continued in possession of transferred property was sufficient to set aside the transfer as fraudulent.

lent. *Weatherly v. Massey-Ferguson, Inc.*, 245 Ark. 317, 432 S.W.2d 18 (1968) (decision under prior law).

Debtors, who gave their daughter a 1986 Pontiac as a high school graduation present, but maintained, for insurance reasons, title and insurance in the father's name, recovery under the fraudulent transfer statutes must fail because the transfer of value was made to the daughter in 1986 when the debtors gave her the 1986 Pontiac. At that time, although the debtor retained legal title to the vehicle, the equitable interest in the vehicle was given to daughter, so that a subsequent change in nominal title did not constitute a "transfer of interest." *Luker v. McCall*, 188 B.R. 402 (Bankr. E.D. Ark. 1995).

### —Indebtedness or Insolvency.

When an embarrassed debtor makes a voluntary conveyance of his property, his indebtedness raises a presumption of fraud against existing creditors, and such presumption becomes conclusive upon insolvency; but a voluntary conveyance by a person in debt is not per se fraudulent as to subsequent creditors, and to impeach it, they must prove actual or intentional fraud. *Driggs & Co.'s Bank v. Norwood*, 50 Ark. 42, 6 S.W. 323 (1887) (decision under prior law).

A voluntary conveyance by one who is indebted raises a prima facie presumption of fraud which becomes conclusive if evidence fails to show that he had other property. *Stix v. Chaytor*, 55 Ark. 116, 17 S.W. 707 (1891) (decision under prior law).

A voluntary conveyance of property by insolvent debtor is fraudulent as to subsequent as well as existing creditors if debtor reasonably had in contemplation the contracting of such future debt at time conveyance was made. *Rudy v. Austin*, 56 Ark. 73, 19 S.W. 111 (1892); *May v. State Nat'l Bank*, 59 Ark. 614, 28 S.W. 431 (1894); *Semmes v. Underwood*, 64 Ark. 415, 42 S.W. 1069 (1897); *Slayden-Kirksey Woolen Mills v. Anderson*, 66 Ark. 419, 50 S.W. 994 (1899); *Buchanan v. Williams*, 110 Ark. 335, 160 S.W. 190 (1913); *Renn v. Renn*, 207 Ark. 147, 179 S.W.2d 657 (1944) (preceding decisions under prior law).

Where grantor in voluntary conveyance was not insolvent, fact that he was in debt raised no presumption of fraud as to subsequent creditors. *Crampton v. Schaap*, 56 Ark. 253, 19 S.W. 669 (1892) (decision under prior law).

Where land was purchased and paid for by the embarrassed husband who subsequently became insolvent and title taken in the name of his wife with the actual intent to hinder and delay his creditors, the land was subject to debts of his creditors both prior and subsequent. *Slayden-Kirksey Woolen Mills v. Anderson*, 66 Ark. 419, 50 S.W. 994 (1899) (decision under prior law).

Where a husband, owning the reversionary estate in lands of which his wife owned a life estate, conveyed his interest to her, thereby depriving himself of the means of paying his debts, his conveyance was a fraud upon the rights of his creditors. *Morris v. Fletcher*, 67 Ark. 105, 56 S.W. 1072 (1899) (decision under prior law).

It is error to instruct the jury that a transfer of property by an embarrassed debtor to a member of his family is to be looked at with suspicion; such an instruction is upon the weight of the evidence. *Smith v. Jackson*, 133 Ark. 334, 202 S.W. 227 (1918) (decision under prior law).

Where debtor was indebted for an attorney's fee, and being insolvent sold a piece of property which he had acquired thereby rendering the fee uncollectable, the sale was fraudulent and was properly set aside. *Fromholtz v. Trimble*, 140 Ark. 282, 215 S.W. 623 (1919) (decision under prior law).

A voluntary transfer of property to near relatives is presumptively fraudulent as to existing creditors, and if made by one who at the time is embarrassed, it is looked upon with suspicion and scrutinized with care. *Crill v. Trites*, 186 Ark. 354, 53 S.W.2d 577 (1932) (decision under prior law).

A gift of property to his child by his father who is largely indebted places the burden on the father to show that his intentions were innocent and that he had at the time ample means to pay his debts. *Crill v. Trites*, 186 Ark. 354, 53 S.W.2d 577 (1932) (decision under prior law).

While conveyances from an insolvent debtor to near relatives are not sufficient of themselves to establish fraud, yet, when added to other suspicious circumstances, they may be sufficient evidence of fraud to justify the court in setting them aside. *Wasson v. Lightle*, 188 Ark. 440, 66 S.W.2d 652 (1933); *Parrish v. Parrish*, 191

Ark. 443, 86 S.W.2d 557 (1935) (preceding decisions under prior law).

Although fraud is never presumed against existing creditors, when an embarrassed debtor conveys property to a near relative, the conveyance must be scrutinized closely, and if found voluntary, it is *prima facie* fraudulent; where the debtor becomes insolvent the presumption becomes conclusive. *Rice v. Rice*, 125 F. Supp. 900 (W.D. Ark. 1954) (decision under prior law) *Clark v. Bank of Bentonville*, 308 Ark. 241, 824 S.W.2d 358 (1992) (decision under prior law).

Under definition of insolvency as a lack of means to pay one's debts, or that if assets were made immediately they would be insufficient to discharge the liabilities, it appeared from the evidence that, at time of alleged fraudulent transfer, the debtor was solvent. *Bank of Sun Prairie v. Hovig*, 218 F. Supp. 769 (W.D. Ark. 1963) (decision under prior law).

Before presumption of fraud on part of grantor may be found, there must be clear distinction made between actual insolvency and mere indebtedness on his part, as mere circumstances of indebtedness is no evidence of fraud. *Bank of Sun Prairie v. Hovig*, 218 F. Supp. 769 (W.D. Ark. 1963) (decision under prior law).

Where plaintiff failed to prove insolvency of defendants at time of the transaction, court could not assume that there were insufficient nonexempt assets of defendants which plaintiff was able to attach to satisfy the judgment. *Bank of Sun Prairie v. Hovig*, 218 F. Supp. 769 (W.D. Ark. 1963) (decision under prior law).

Former statute was not applicable where husband's indebtedness did not exist at the time of conveyance to his wife, nor was it contracted shortly afterwards, and there was no evidence that quitclaiming his interest in the property caused him to be insolvent at that time, nor was he insolvent at the time he contracted with the creditor. *Hanna v. Miller*, 9 Ark. App. 255, 657 S.W.2d 563 (1983) (decision under prior law).

The question of a debtor's solvency for purposes of determining fraudulent intent is not the ultimate question but is simply a matter for consideration in determining whether a conveyance was made with intent to delay, hinder, or defraud creditors. *Clark v. Bank of Bentonville*, 308 Ark. 241, 824 S.W.2d 358 (1992).

Debtors did not commit actual fraud, but, given the circumstances at the time of the transfer, specifically a lack of consideration for the transfer to a family member and the balance sheet insolvency of the debtors, the transfer was constructively fraudulent under 11 U.S.C.S. § 548(a)(1)(B) and subdivision (a)(2) of this section. *Luker v. Eubanks* (In re Eubanks), 444 B.R. 415 (Bankr. E.D. Ark. 2010).

### **—Pendency or Threat of Litigation.**

Conveyance by judgment debtor of all his property to wife after service of summons will be viewed with suspicion, and the burden is upon the wife to show that the conveyance was not executed for a fraudulent purpose. *Papan v. Nahay*, 106 Ark. 230, 152 S.W. 107 (1913) (decision under prior law).

Transfer pending, or under threat of, litigation held fraudulent. *Robinson v. Bigger*, 199 Ark. 1152, 137 S.W.2d 738 (1940); *Murphy v. Marshall*, 203 Ark. 986, 159 S.W.2d 741 (1942) (preceding decisions under prior law).

Transfer pending, or under threat of, litigation held not fraudulent. *Bank of Sun Prairie v. Hovig*, 218 F. Supp. 769 (W.D. Ark. 1963); *Ralston Purina Co. v. Davis*, 256 Ark. 972, 511 S.W.2d 482 (1974) (preceding decisions under prior law).

Generally, intent to defraud or knowledge on part of purchaser that vendor has committed fraud may be established by fact of pendency of litigation, and trier of facts may properly consider this circumstance in determining whether purchaser bought with notice; however, such knowledge of purchaser does not of itself establish fraudulent intent on his part, and adverse evidentiary effect thereof may be overcome in good faith, paying a valuable consideration. *Bank of Sun Prairie v. Hovig*, 218 F. Supp. 769 (W.D. Ark. 1963) (decision under prior law).

Intent to defraud on the part of the vendor may be established by evidence of the pendency of litigation against the vendor. *In re Baugh*, 60 B.R. 102 (Bankr. E.D. Ark. 1986) (decision under prior law).

### **—Proof.**

Fraud is never presumed. *Toney v. McGehee*, 38 Ark. 419 (1882) (decision under prior law).

A voluntary postnuptial settlement upon a wife is presumptively fraudulent against existing creditors and casts upon those holding under it the onus of proving the entire good faith of the transaction. *Adams v. Edgerton*, 48 Ark. 419, 3 S.W. 628 (1886) (decision under prior law).

Where a conveyance is made under such circumstances that the result must necessarily be to hinder and delay creditors, it will be presumed that such was the intent of the transferor. *Evans v. Cheatham*, 183 Ark. 82, 34 S.W.2d 1076 (1931); *Bank of Sun Prairie v. Hovig*, 218 F. Supp. 769 (W.D. Ark. 1963) (preceding decisions under prior law).

Fraud is never presumed, but must be affirmatively proved by a clear preponderance of the evidence by the party who alleges and relies on it. *Bank of Sun Prairie v. Hovig*, 218 F. Supp. 769 (W.D. Ark. 1963); *Ouachita Elec. Coop. Corp. v. Evans-St. Clair*, 12 Ark. App. 171, 672 S.W.2d 660 (1984) (preceding decisions under prior law).

In an action by a creditor to set aside as fraudulent real estate conveyance by the debtor to his wife, there was not burden upon the creditor to show by evidence that the debtor had equity in the properties conveyed. *Allis v. Jones*, 403 F.2d 707 (8th Cir. 1968) (decision under prior law).

An intent to defraud a subsequent creditor must be shown before a voluntary conveyance will be avoided; such a subsequent creditor must prove fraudulent intent by evidence which is clear, cogent, and convincing. *Hanna v. Miller*, 9 Ark. App. 255, 657 S.W.2d 563 (1983) (decision under prior law).

In a suit to set aside a fraudulent conveyance, the allegation of fraud must be shown by a preponderance of the evidence, and while fraud may be established by circumstantial evidence, the circumstances must be so strong and well connected as to clearly show fraud. *Ouachita Elec. Coop. Corp. v. Evans-St. Clair*, 12 Ark. App. 171, 672 S.W.2d 660 (1984); *Tipp v. United Bank*, 23 Ark. App. 176, 745 S.W.2d 141 (1988) (preceding decisions under prior law).

The creditor who seeks to set aside a conveyance as fraudulent must show that his debtor has disposed of property that might otherwise have been subjected to the satisfaction of his debt. *Ouachita Elec. Coop. Corp. v. Evans-St. Clair*, 12 Ark.

App. 171, 672 S.W.2d 660 (1984) (decision under prior law).

The questions of whether the debtor must be solvent and whether the date to use in determining intent is when the conveyance is executed or when it is filed for record are not ultimate questions but are simply matters for consideration in making the determination of whether the conveyance was made with intent to delay, hinder, or defraud creditors. *Lessman v. Dawson*, 14 Ark. App. 285, 687 S.W.2d 860 (1985) (decision under prior law).

The burden of proof is on the party alleging a fraudulent conveyance, and the fraud must be proved by clear and convincing evidence. *In re Baugh*, 60 B.R. 102 (Bankr. E.D. Ark. 1986) (decision under prior law).

Factors typically attendant to a fraudulent conveyance are the insolvency of the transferor, inadequate or fictitious consideration, retention by the debtor of the property transferred, secrecy or concealment, and the fact that the disputed transaction was conducted in a manner differing from the usual transaction. *In re Baugh*, 60 B.R. 102 (Bankr. E.D. Ark. 1986) (decision under prior law).

The party who alleges and relies upon fraud bears the burden of proving fraud by a preponderance of the evidence. *Tipp v. United Bank*, 23 Ark. App. 176, 745 S.W.2d 141 (1988) (decision under prior law); *Clark v. Bank of Bentonville*, 308 Ark. 241, 824 S.W.2d 358 (1992) (decision under prior law).

A conveyance to a trust was determined to be fraudulent where: 1) On the date of the conveyance, the defendants were without sufficient liquid assets to make payments to the plaintiff; 2) the consideration was nominal; 3) the trust agreement allowed defendants to retain certain incidents of ownership over the property; and 4) the conveyance at issue was made after the plaintiff made demands on the defendants and advised them that their obligations were under-collateralized. *Clark v. Bank of Bentonville*, 308 Ark. 241, 824 S.W.2d 358 (1992).

### **Gambling Debt.**

Arkansas public policy does not necessarily preclude enforcement of valid and legal gambling debts incurred in another state. *In re Armstrong*, 217 B.R. 569 (Bankr. E.D. Ark. 1998).

**Good-Faith Purchasers.**

Purchaser's good faith must exist both at the time of the purchase and at the time the consideration is paid. Purchasers would not be treated as good-faith purchasers where, although there was no evidence that they had notice of the debtor's financial difficulties or the pendency of litigation at the time that they entered into a land-sale contract, there was evidence that they had such notice at the time the consideration was paid. *Tipp v. United Bank*, 23 Ark. App. 176, 745 S.W.2d 141 (1988) (decision under prior law).

**Leases.**

Unacknowledged long term lease, given by a husband to his mother for a nominal consideration and which was intended to prevent the wife from recovering her statutory interest in the land subsequent to a divorce, was not valid against purchasers who had no actual knowledge of the lease and could not be charged with constructive notice; accordingly lease was properly cancelled. *George v. George*, 267 Ark. 823, 591 S.W.2d 655 (Ct. App. 1979) (decision under prior law).

**Miscellaneous Transfers.**

Purchase of assets of corporation by director is voidable at instance of creditor. *Jones, McDowell & Co. v. Arkansas Mechanical & Agric. Co.*, 38 Ark. 17 (1881) (decision under prior law).

There is no fraud in taking goods in satisfaction of a mortgage on a homestead. *Flask, Preston & Co. v. Tindall*, 39 Ark. 571 (1882) (decision under prior law).

A voluntary settlement by a husband of all his property upon his wife is absolutely void, not only as to existing creditors but also as to subsequent purchasers without notice. *Adams v. Edgerton*, 48 Ark. 419, 3 S.W. 628 (1886) (decision under prior law).

Transfers held fraudulent. *Catchings v. Harcrow*, 49 Ark. 20, 3 S.W. 884 (1886); *Alkire Grocery Co. v. Jackson*, 66 Ark. 455, 51 S.W. 459 (1899); *Sumpter v. Arkansas Nat'l Bank*, 69 Ark. 224, 62 S.W. 577 (1901); *McTighe v. McKee*, 70 Ark. 293, 67 S.W. 754 (1902); *Reeves v. Slade*, 71 Ark. 611, 77 S.W. 54 (1903); *Robinson v. Bigger*, 199 Ark. 1152, 137 S.W.2d 738 (1940); *Renn v. Renn*, 207 Ark. 147, 179 S.W.2d 657 (1944); *Harris v. Shaw*, 224 Ark. 150, 272 S.W.2d 53 (1954); *Kelker v. Hendricks*,

228 Ark. 222, 306 S.W.2d 691 (1957); *Connelly v. Thomas*, 234 Ark. 1024, 356 S.W.2d 430 (1962); *Lessman v. Dawson*, 14 Ark. App. 285, 687 S.W.2d 860 (1985); *Pults v. City of Springdale*, 23 Ark. App. 182, 745 S.W.2d 144 (1988) (preceding decisions under prior law).

Transfers held not fraudulent. *Davis v. Arkansas Fire Ins. Co.*, 63 Ark. 412, 39 S.W. 258 (1897); *Crill v. Trites*, 186 Ark. 354, 53 S.W.2d 577 (1932); *Bank of Sun Prairie v. Hovig*, 218 F. Supp. 769 (W.D. Ark. 1963); *American Insurers' Life Ins. Co. v. First Nat'l Bank*, 236 Ark. 361, 367 S.W.2d 97 (1963); *Saunders v. Adcock*, 249 Ark. 856, 462 S.W.2d 219 (1971); *Ralston Purina Co. v. Davis*, 256 Ark. 972, 511 S.W.2d 482 (1974) (preceding decisions under prior law).

No formal assignment of a contract to build is necessary in order to constitute a fraudulent transfer where the other elements of a fraudulent transfer of property are present. *Southern Lumber Co. v. Riley*, 224 Ark. 298, 273 S.W.2d 848 (1954) (decision under prior law).

An assignment of an oral contract to build made to near relatives and members of the household is scrutinized with care where the assignor continues the work, and when the assignment is voluntary it is prima facie fraudulent; if the assignor becomes insolvent, it is conclusively presumed fraudulent regardless of the motive behind the transfer. *Southern Lumber Co. v. Riley*, 224 Ark. 298, 273 S.W.2d 848 (1954) (decision under prior law).

Where evidence has shown that circumstances surrounding the original conveyance by judgment debtor were innocent and not fraudulent, succeeding transfer of lands, fixtures, etc., to final grantee could not be attacked by judgment creditor as to fraudulent conveyance. *Bank of Sun Prairie v. Hovig*, 218 F. Supp. 769 (W.D. Ark. 1963) (decision under prior law).

A preference of one creditor over another does not in itself make the transfer to the preferred creditor void or voidable as a fraudulent conveyance. *Nicklaus v. Peoples Bank & Trust Co.*, 258 F. Supp. 482 (E.D. Ark. 1965), *aff'd*, 369 F.2d 683 (8th Cir. 1966); *Ouachita Elec. Coop. Corp. v. Evans-St. Clair*, 12 Ark. App. 171, 672 S.W.2d 660 (1984) (preceding decisions under prior law).

Payment of an antecedent debt accepted by a bank in good faith is not a fraudulent

conveyance. *Nicklaus v. Peoples Bank & Trust Co.*, 369 F.2d 683 (8th Cir. 1966) (decision under prior law).

Although fraud is never presumed, where it is shown that the debtor, while insolvent, voluntarily conveyed property to a near relative, such conveyance is prima facie evidence of a fraudulent conveyance; the burden of coming forward with the evidence to show that the transfer was not fraudulent shifts to the debtor. *In re Baugh*, 60 B.R. 102 (Bankr. E.D. Ark. 1986) (decision under prior law).

Although the debtor's father had previously given the debtor over \$100,000, the debtor's transfer of \$86,000 to his father was a fraudulent conveyance where there was no evidence that the previous payments were loans or that the father ever intended that he be paid back, the money was removed from the reach of the debtor's creditors, and the transfer allowed the debtor the use of the money as he needed it while he was insolvent. *In re Baugh*, 60 B.R. 102 (Bankr. E.D. Ark. 1986).

Transfer of real estate from the debtor to her parents set aside. *Schieffler v. Beshears*, 182 B.R. 235 (Bankr. E.D. Ark. 1995).

Federal government and a judgment creditor were entitled to set aside debtors' transfer of certain real estate into trusts because the trust transfers were made with the intent to defraud creditors, including the government, which had a tax assessment against the creditors, and the judgment creditor, since the trusts were shams, used to shelter assets from creditors as they lacked adequate consideration, rendered the debtors insolvent, and the debtors retained the use and enjoyment of the real estate and were the beneficial owners of the real estate. *United States v. Neal*, — F. Supp. 2d —, 255 F.R.D. 638, 2008 U.S. Dist. LEXIS 107768 (W.D. Ark. Dec. 30, 2008), *aff'd*, — F.3d —, 2010 U.S. App. LEXIS 18553 (8th Cir. Ark. 2010).

Defendant's presentencing conveyance of 120 acres of real property to defendant's daughters, with a reservation of a life estate for defendant and his wife, was a fraudulent conveyance under this section. The evidence showed that defendant was trying to divest himself of the property to that it would be unavailable to pay a criminal fine, and the quitclaim deed recited nominal consideration and stated

that the transfer was by gift. *United States v. Fincher*, 593 F.3d 702 (8th Cir. 2010).

### **Parol Evidence.**

A mortgage may be shown by parol to have been executed for fraudulent purposes. *Stephens v. Stephens*, 66 Ark. 356, 50 S.W. 874 (1899) (decision under prior law).

### **Protected Parties.**

The law will not relieve either party from an executed contract, or aid either to enforce an executory contract, made to defraud creditors. *Payne v. Bruton*, 10 Ark. 53 (1849) (decision under prior law).

One who is not a creditor is not in position to ask chancery to set aside an alleged fraudulent conveyance. *King v. Clay*, 34 Ark. 291 (1879); *Townslly-Myrick Dry Goods Co. v. Fuller*, 58 Ark. 181, 24 S.W. 108 (1893) (preceding decisions under prior law).

If creditors condone fraud, conveyance will stand against all comers. *Millington v. Hill*, 47 Ark. 301, 1 S.W. 547 (1886) (decision under prior law).

A party bargaining with debtor with fraudulent intent does so at peril of having that which he receives taken from him by creditors of debtors, without having any remedy to recover what he parts with in carrying out bargain. *Millington v. Hill*, 47 Ark. 301, 1 S.W. 547 (1886) (decision under prior law).

A conveyance to defraud creditors is good between the parties and against all persons except creditors of the grantor who are in a position to assail it. *Knight v. Glasscock*, 51 Ark. 390, 11 S.W. 580 (1888); *Bell v. Wilson*, 52 Ark. 173, 12 S.W. 1135 (1889); *Doster v. Manistee Nat'l Bank*, 67 Ark. 325, 55 S.W. 137 (1900) (preceding decisions under prior law).

A widow has no dowable interest in lands bought by her husband when he takes title in the name of a third party in order to defraud creditors for the reason that he had no estate of inheritance in the same. *Johnson v. Johnson*, 106 Ark. 9, 152 S.W. 1017 (1912) (decision under prior law).

A conveyance in fraud of creditors is void only at the instance of the injured creditor, and where transferor conveyed a note of the debtor could not defeat payment, in a suit by the transferee, on the

ground that transferor made the transfer to the transferee in order to defraud the debtor's creditors. *Segraves v. Brooks*, 123 Ark. 261, 185 S.W. 260 (1916) (decision under prior law).

Former statute protected both prior and subsequent creditors. *Home Life & Accident Co. v. Schichtl*, 172 Ark. 31, 287 S.W. 769 (1926) (decision under prior law).

A wife obtaining a decree for divorce, alimony, maintenance, and dower was a creditor of the husband from the time the decree was rendered and entitled to interest in land which the husband fraudulently allowed to be sold for taxes and conveyed to his brother. *Renn v. Renn*, 207 Ark. 147, 179 S.W.2d 657 (1944) (decision under prior law).

Before a creditor can complain of a conveyance by a debtor, he must show that he was injured by the conveyance. *Sieb's Hatcheries, Inc. v. Lindley*, 111 F. Supp. 705 (W.D. Ark. 1953), *aff'd*, 209 F.2d 674 (8th Cir. 1954); *Bank of Sun Prairie v. Hovig*, 218 F. Supp. 769 (W.D. Ark. 1963) (preceding decisions under prior law).

A conveyance by one tenant by the entirety, or an execution against such tenant, cannot in any manner affect the interest of the other tenant. *Sieb's Hatcheries, Inc. v. Lindley*, 111 F. Supp. 705 (W.D. Ark. 1953), *aff'd*, 209 F.2d 674 (8th Cir. 1954) (decision under prior law).

### **Purchasers.**

A mortgagee was a purchaser within former statute. *Adams v. Edgerton*, 48 Ark. 419, 3 S.W. 628 (1886) (decision under prior law).

### **Remedies.**

Where voluntary conveyance was made in fraud of prior creditors, subsequent creditors whose means were used to pay off prior debts will be subrogated to rights of prior creditors. *Rudy v. Austin*, 56 Ark. 73, 19 S.W. 111 (1892) (decision under prior law).

Where endorser of a note without consideration transferred stock in corporation to another, payee could follow such stock and subject it to endorser's debts. *A.H. Scoggin & Co. v. City Nat'l Bank*, 175 Ark. 461, 299 S.W. 1033 (1927) (decision under prior law).

Garnishment is available against the payments due on a contract which is

fraudulently assigned to defraud creditors where the action is in equity and all interested parties are before the court. *Southern Lumber Co. v. Riley*, 224 Ark. 298, 273 S.W.2d 848 (1954) (decision under prior law).

### **Spouses.**

The sale of diamonds by the plaintiff's wife to a jeweler did not constitute a fraudulent conveyance since the plaintiff was not a creditor of his wife. *McAdams v. Ellington*, 333 Ark. 362, 970 S.W.2d 203 (1998).

Motion for judgment notwithstanding the verdict was denied in a case involving fraudulent transfers to a wife, as an insider, by a judgment debtor under § 4-59-204(a)(1) because the debtor and the wife were unable to substantiate the claim that wife purchased the stocks with money won at a horse race or that a transfer was due to the debtor's poor health. *Laird v. Weigh Sys. South II, Inc.*, 98 Ark. App. 393, 255 S.W.3d 900 (2007).

### **Transfer to Creditors.**

An embarrassed debtor may convey his property to a creditor in satisfaction of a debt, even though the effect of the transfer would defeat the rest of his creditors, but such transfer must be in good faith and for a valid debt. *Sieb's Hatcheries, Inc. v. Lindley*, 111 F. Supp. 705 (W.D. Ark. 1953), *aff'd*, 209 F.2d 674 (8th Cir. 1954) (preceding decisions under prior law).

### **Value.**

In determining that the ex-husband did not receive a reasonably equivalent value for business assets transferred to his ex-wife, the trial court did not err in failing to diminish the net value of assets transferred to the wife by a contingent liability associated with the business assets where the wife never submitted any evidence regarding the likelihood that the contingent liability would materialize. *FDIC v. Bell*, 106 F.3d 258 (8th Cir. 1997), *cert. denied*, *Hewlett-Packard Co. v. Repeat-O-Type Stencil Mfg. Corp.*, 523 U.S. 1022, 118 S. Ct. 1304, 140 L. Ed. 2d 470 (1998).

**Cited:** *Roberts v. Feltman*, 55 Ark. App. 142, 932 S.W.2d 781 (1996); *Brown v. Brown*, 265 B.R. 167 (Bankr. E.D. Ark. 2001).

**4-59-205. Transfers fraudulent as to present creditors.**

(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

(b) A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

**History.** Acts 1987, No. 967, § 5.

**CASE NOTES**

**Cited:** Luker v. McCall, 188 B.R. 402  
(Bankr. E.D. Ark. 1995).

**4-59-206. When transfer is made or obligation is incurred.**

For the purposes of this subchapter:

(1) a transfer is made:

(i) with respect to an asset that is real property other than a fixture, but including the interest of a seller or purchaser under a contract for the sale of the asset, when the transfer is so far perfected that a good faith purchaser of the asset from the debtor against whom applicable law permits the transfer to be perfected cannot acquire an interest in the asset that is superior to the interest of the transferee; and

(ii) with respect to an asset that is not real property or that is a fixture, when the transfer is so far perfected that a creditor on a simple contract cannot acquire a judicial lien otherwise than under this subchapter that is superior to the interest of the transferee;

(2) if applicable law permits the transfer to be perfected as provided in subdivision (1) of this section and the transfer is not so perfected before the commencement of an action for relief under this subchapter, the transfer is deemed made immediately before the commencement of the action;

(3) if applicable law does not permit the transfer to be perfected as provided in subdivision (1) of this section, the transfer is made when it becomes effective between the debtor and the transferee;

(4) a transfer is not made until the debtor has acquired rights in the asset transferred;

(5) an obligation is incurred:

(i) if oral, when it becomes effective between the parties; or

(ii) if evidenced by a writing, when the writing executed by the obligor is delivered to or for the benefit of the obligee.

No court order or judgment of a court shall be an obligation incurred under this subchapter.

**History.** Acts 1987, No. 967, § 6; 1993, No. 1279, § 2.

### CASE NOTES

#### ANALYSIS

Debtors in Bankruptcy.  
Deeds.

#### Debtors in Bankruptcy.

Although the transfer of the land allegedly occurred in 1986, for purposes of the Arkansas fraudulent transfer statute, the transfer and the effect upon the debtor and his insolvency status must be analyzed at the time the deed was recorded in 1995. *Williams v. Marlar*, 246 B.R. 606

(Bankr. W.D. Ark. 2000), *aff'd*, *Williams v. Marlar* (In re *Marlar*), 252 B.R. 743 (B.A.P. 8th Cir. 2000).

#### Deeds.

Even though deed was executed and delivered prior to investigation and recorded while audit was in progress, evidence found sufficient to hold transfer fraudulent and void. *Murphy v. Marshall*, 203 Ark. 986, 159 S.W.2d 741 (1942) (decision under prior law).

### 4-59-207. Remedies of creditors.

(a) In an action for relief against a transfer or obligation under this subchapter, a creditor, subject to the limitations in § 4-59-208, may obtain:

(1) avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim;

(2) an attachment or other provisional remedy against the asset transferred or other property of the transferee in accordance with the procedure prescribed by §§ 16-110-201 — 16-110-211;

(3) subject to applicable principles of equity and in accordance with applicable rules of civil procedure,

(i) an injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property;

(ii) appointment of a receiver to take charge of the asset transferred or of other property of the transferee; or

(iii) any other relief the circumstances may require.

(4) a settlement agreement with the transferee or a child support creditor or the Office of Child Support Enforcement of the Revenue Division of the Department of Finance and Administration in Title IV-D cases.

(b) If a creditor has obtained a judgment on a claim against the debtor, the creditor, if the court so orders, may levy execution on the asset transferred or its proceeds.

**History.** Acts 1987, No. 967, § 7; 1997, No. 1296, § 2.

**U.S. Code.** Title IV-D, referred to in

this section, is a reference to Title IV-D of the Social Security Act, codified as 42 U.S.C. § 651 et seq.

## RESEARCH REFERENCES

**Ark. L. Rev.** Corporations — Internal Dissension as a Ground for Equity's Ap-

pointing a Receiver for a Solvent Corporation, 4 Ark. L. Rev. 228.

## CASE NOTES

## ANALYSIS

**In General.**

Avoidance of the Transfer.

Equitable Garnishments.

Jurisdiction.

Persons Protected.

Proof of Insolvency.

**In General.**

Setting aside fraudulent conveyances — Proof of insolvency. *Rudy v. Austin*, 56 Ark. 73, 19 S.W. 111 (1892); *Davis v. Beauchamp*, 99 Ark. 404, 138 S.W. 636 (1911) (preceding decisions under prior law).

The statute did not apply so as to allow a judgment creditor to recover either from a family farming corporation in which the judgment debtor owned stock or from the majority shareholder in that corporation after the judgment debtor transferred that stock to a family-owned limited partnership. *Thomsen Family Trust v. Peterson Family Enters., Inc.*, 66 Ark. App. 294, 989 S.W.2d 934 (1999).

**Avoidance of the Transfer.**

Transfer of real estate from the debtor to her parents set aside. *Schieffler v. Beshears*, 182 B.R. 235 (Bankr. E.D. Ark. 1995).

**Equitable Garnishments.**

A suit in equity to subject the debt of a third person to the extinguishment of plaintiff's demand against his debtor was an equitable garnishment within the meaning of former statute. *Riggin v. Hilliard*, 56 Ark. 476, 20 S.W. 402 (1892) (decision under prior law).

Garnishment was available against the payments due on a contract which was fraudulently assigned to defraud creditors where the action was in equity and all interested parties were before the court. *Southern Lumber Co. v. Riley*, 224 Ark. 298, 273 S.W.2d 848 (1954) (decision under prior law).

**Jurisdiction.**

Where there was personal service of the defendant's person, sequestration of his

property was unnecessary to give the court jurisdiction to cancel a conveyance as fraudulent. *Smith v. Arkadelphia Milling Co.*, 143 Ark. 214, 220 S.W. 49 (1920) (decision under prior law).

In order that relief be granted under former statute, it was necessary that the chancery court have jurisdiction of the subject matter. *Horstmann v. La Fargue*, 140 Ark. 558, 215 S.W. 729 (1919), overruled, *Spitzer v. Barnhill*, 237 Ark. 525, 374 S.W.2d 811 (1964), overruled in part, *Spitzer v. Barnhill*, 237 Ark. 525, 374 S.W.2d 811 (1964) (decision under prior law).

Former statute was concerned only with the avoidance of fraudulent conveyances; and consequently, where a tort claimant sought a restraining order in chancery court to enjoin the alleged tortfeasor from denuding himself of his assets and amended her complaint to assert also her cause of action in tort, the tort action should have been transferred to a court of law. *Spitzer v. Barnhill*, 237 Ark. 525, 374 S.W.2d 811 (1964) (decision under prior law).

**Persons Protected.**

The benefits of former statute were conferred upon anyone who, before the statute, would have had the right after his cause of action had been reduced to judgment, to sue to set aside a fraudulent conveyance. *Horstmann v. La Fargue*, 140 Ark. 558, 215 S.W. 729 (1919), overruled, *Spitzer v. Barnhill*, 237 Ark. 525, 374 S.W.2d 811 (1964), overruled in part, *Spitzer v. Barnhill*, 237 Ark. 525, 374 S.W.2d 811 (1964) (decision under prior law).

**Proof of Insolvency.**

Former statute did not dispense with the necessity of proving the debtor's insolvency under the rule that equity would not lend its aid when the remedy at law was full and adequate. *Davis v. Arkansas Fire Ins. Co.*, 63 Ark. 412, 39 S.W. 258 (1897); *Euclid Ave. Nat'l Bank v. Judkins*, 66 Ark. 486, 51 S.W. 632 (1899) (preceding decisions under prior law).

A bill in equity to set aside a conveyance by a joint debtor, alleged to be insolvent, was insufficient if it failed to allege that other debtors, jointly bound with him, were likewise insolvent. *Euclid Ave. Nat'l Bank v. Judkins*, 66 Ark. 486, 51 S.W. 632 (1899) (decision under prior law).

Where defendant is admittedly insolvent, it is not necessary to show an execution issued on the judgment with a nulla bona return. *Fluke v. Sharum*, 118 Ark. 229, 176 S.W. 684 (1915) (decision under prior law).

Where a complaint alleged that the defendant was insolvent and the answer did

not deny the allegation, it was unnecessary to prove it. *Horstmann v. La Fargue*, 140 Ark. 558, 215 S.W. 729 (1919), overruled, *Spitzer v. Barnhill*, 237 Ark. 525, 374 S.W.2d 811 (1964), overruled in part, *Spitzer v. Barnhill*, 237 Ark. 525, 374 S.W.2d 811 (1964) (decision under prior law).

**Cited:** *Helm v. Mid-America Indus., Inc.*, 305 Ark. 12, 804 S.W.2d 727 (1991); *FDIC v. Bell*, 106 F.3d 258 (8th Cir. 1997); *In re Hogan*, 214 B.R. 1022 (Bankr. E.D. Ark. 1997); *In re Armstrong*, 217 B.R. 569 (Bankr. E.D. Ark. 1998); *Williams v. Marlar*, 246 B.R. 606 (Bankr. W.D. Ark. 2000).

#### **4-59-208. Defenses, liability, and protection of transferee.**

(a) A transfer or obligation is not voidable under § 4-59-204(a)(1) against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee.

(b) Except as otherwise provided in this section, to the extent a transfer is voidable in an action by a creditor under § 4-59-207(a)(1), the creditor may recover judgment for the value of the asset transferred, as adjusted under subsection (c) of this section, or the amount necessary to satisfy the creditor's claim, whichever is less. The judgment may be entered against:

(1) the first transferee of the asset or the person for whose benefit the transfer was made; or

(2) any subsequent transferee other than a good faith transferee who took for value or from any subsequent transferee.

(c) If the judgment under subsection (b) of this section is based upon the value of the asset transferred, the judgment must be for an amount equal to the value of the asset at the time of the transfer, subject to adjustment as the equities may require.

(d) Notwithstanding voidability of a transfer or an obligation under this subchapter, a good faith transferee or obligee is entitled, to the extent of the value given the debtor for the transfer or obligation, to:

(1) a lien on or a right to retain any interest in the asset transferred;

(2) enforcement of any obligation incurred; or

(3) a reduction in the amount of the liability on the judgment.

(e) A transfer is not voidable under § 4-59-204(a)(2) or § 4-59-205 if the transfer results from:

(1) termination of a lease upon default by the debtor when the termination is pursuant to the lease and applicable law; or

(2) enforcement of a security interest in compliance with chapter 9 of the Uniform Commercial Code, § 4-9-101 et seq.

(f) A transfer is not voidable under § 4-59-205(b):

(1) to the extent the insider gave new value to or for the benefit of the debtor after the transfer was made unless the new value was secured by a valid lien;

(2) if made in the ordinary course of business or financial affairs of the debtor and the insider; or

(3) if made pursuant to a good faith effort to rehabilitate the debtor and the transfer secured present value given for that purpose as well as an antecedent debt of the debtor.

**History.** Acts 1987, No. 967, § 8.

## CASE NOTES

### ANALYSIS

**In General.**

**Conditional Sales.**

**Notice of Fraud.**

**Persons Protected.**

**Purchaser.**

### **In General.**

Pretended loans — Rights of creditors of persons in possession of property. *Martin v. Vaught*, 128 Ark. 293, 194 S.W. 10 (1917) (decision under prior law).

The statute did not apply so as to allow a judgment creditor to recover either from a family farming corporation in which the judgment debtor owned stock or from the majority shareholder in that corporation after the judgment debtor transferred that stock to a family-owned limited partnership. *Thomsen Family Trust v. Peterson Family Enters., Inc.*, 66 Ark. App. 294, 989 S.W.2d 934 (1999).

### **Conditional Sales.**

If former statute applied to conditional sales, it had no application unless the possession continued for the statutory period. *Blackwell, Thompson & Co. v. Walker Bros. & Co.*, 5 F. 419 (C.C.E.D. Ark. 1880) (decision under prior law).

### **Notice of Fraud.**

Purchaser from fraudulent grantee, having sufficient notice to put him on inquiry, as a man of ordinary prudence and experience in business transactions, will not be allowed to protect himself by want of notice, as an innocent purchaser. *Ringgold v. Waggoner*, 14 Ark. 69 (1853) (decision under prior law).

### **Persons Protected.**

Former statute conferred the absolute right of property by uninterrupted possession only in favor of creditors and pur-

chasers, and not to the possessor for statutory period. *State Bank v. Williams*, 6 Ark. 156 (1845) (decision under prior law).

Where corporation gave a promissory note to a trust in exchange for a physician's interest in his practice (the physician previously transferred his interest to the trust), although the bankruptcy court determined that the debtor's payments on the note were fraudulent transfers, the court determined that the physician's receipt of distributions from the trust were received in good faith and for value where (1) the physician clearly was unaware that he was accepting payments that might be subject to a subsequent avoidance proceeding in bankruptcy, (2) there was no evidence that he acted in any manner other than in good faith, and (3) the principal, if not sole, asset of the trust — the promissory note from the corporation — represented an asset arising from transfers made to the trust by the physician. *Meeks v. Healthcorp of Tenn., Inc. (In re Southern Health Care of Ark.)*, 299 B.R. 918 (Bankr. E.D. Ark. 2003), *aff'd*, *Meeks v. Don Howard Charitable Remainder Trust (In re S. Health Care of Ark., Inc.)*, 309 B.R. 314 (B.A.P. 8th Cir. 2004).

### **Purchaser.**

To avoid fraudulent conveyance, proof of grantee's participation in fraud is unnecessary where the grantee is a voluntary donee, but where he is a purchaser for a valuable consideration, such proof is necessary. *Hershy v. Latham*, 46 Ark. 542 (1885) (decision under prior law).

**Cited:** *Helm v. Mid-America Indus., Inc.*, 305 Ark. 12, 804 S.W.2d 727 (1991); *First Nat'l Bank & Trust Co. v. Hollingsworth*, 931 F.2d 1295 (8th Cir. 1991); *In re Armstrong*, 217 B.R. 569 (Bankr. E.D. Ark. 1998); *Meeks v. Red River Entertainment*, 231 B.R. 739 (E.D. Ark. 1999).

**4-59-209. Extinguishment of cause of action.**

A cause of action with respect to a fraudulent transfer or obligation under this subchapter is extinguished unless action is brought:

(a) under § 4-59-204(a)(1), within three (3) years after the transfer was made or the obligation was incurred;

(b) under § 4-59-204(a)(2) or § 4-59-205(a), within three (3) years after the transfer was made or the obligation was incurred; or

(c) under § 4-59-205(b), within one (1) year after the transfer was made or the obligation was incurred.

**History.** Acts 1987, No. 967, § 9; 1993, No. 1279, § 3.

**4-59-210. Supplementary provisions.**

Unless displaced by the provisions of this subchapter, the principles of law and equity, including the law merchant and the law relating to principal and agent, estoppel, laches, fraud, misrepresentation, duress, coercion, mistake, insolvency, or other validating or invalidating cause, supplement its provisions.

**History.** Acts 1987, No. 967, § 10.

**4-59-211. Uniformity of application and construction.**

This subchapter shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this subchapter among states enacting it.

**History.** Acts 1987, No. 967, § 11.

**4-59-212. Short title.**

This subchapter may be cited as the Arkansas Fraudulent Transfer Act.

**History.** Acts 1987, No. 967, § 12.

**4-59-213. Repeal.**

The following acts and all other acts and parts of acts inconsistent herewith are hereby repealed:

(a) Sections 1 through 7, Chapter 65 Revised Statutes of 1837;

(b) Section 1 of Act 99 of March 31, 1887;

(c) Section 1 of Act 24 of 1965, First Extraordinary Session.

**History.** Acts 1987, No. 967, § 13.

### SUBCHAPTER 3 — BILLS OF LADING

#### SECTION.

- 4-59-301. Issuance of bill for goods not received.  
 4-59-302. Issuance of bill containing false statement.  
 4-59-303. Issuance of duplicate bills not so marked.  
 4-59-304. Issuance of nonnegotiable bill not so marked.

#### SECTION.

- 4-59-305. Inducing carrier to issue bill when goods have not been received.  
 4-59-306. Negotiation of bill for unowned or mortgaged goods.  
 4-59-307. Negotiation of bill when goods are not in carrier's possession.

#### 4-59-301. Issuance of bill for goods not received.

Any officer, agent, or servant of a carrier who with intent to defraud issues or aids in issuing a bill, knowing that all or any part of the goods for which the bill is issued have not been received by the carrier or by an agent of the carrier or by a connecting carrier or are not under the carrier's control at the time of issuing the bill, shall be guilty of a Class D felony.

**History.** Acts 1941, No. 264, § 44; A.S.A. 1947, § 68-1144; Acts 2005, No. 1994, § 421.

#### CASE NOTES

##### Refusal to Receive Property.

Former similar provision did not relieve a carrier from liability to the penalty prescribed in § 23-4-705 for a violation of § 23-4-702 by a refusal to receive property

tendered to it for shipment. *St. Louis, I. M. & S. R. Co. v. State*, 84 Ark. 150, 104 S.W. 1106 (1907) (decision under prior law).

#### 4-59-302. Issuance of bill containing false statement.

Any officer, agent, or servant of a carrier who with intent to defraud issues or aids in issuing a bill for goods, knowing that it contains any false statement, shall be guilty of a Class A misdemeanor.

**History.** Acts 1941, No. 264, § 45; A.S.A. 1947, § 68-1145; Acts 2005, No. 1994, § 214.

#### 4-59-303. Issuance of duplicate bills not so marked.

Any officer, agent, or servant of a carrier who with intent to defraud issues or aids in issuing a duplicate or additional negotiable bill for goods, knowing that a former negotiable bill for the same goods or any part of them is outstanding and uncanceled, shall be guilty of a crime and upon conviction shall be punished for each offense by imprisonment not exceeding five (5) years or by a fine not exceeding five thousand dollars (\$5,000), or by both.

**History.** Acts 1941, No. 264, § 46;  
A.S.A. 1947, § 68-1146.

#### **4-59-304. Issuance of nonnegotiable bill not so marked.**

Any person who with intent to defraud issues or aids in issuing a nonnegotiable bill without the words "not negotiable" placed plainly upon the face thereof shall be guilty of a crime and upon conviction shall be punished for each offense by imprisonment not exceeding five (5) years or by a fine not exceeding five thousand dollars (\$5,000), or by both.

**History.** Acts 1941, No. 264, § 50;  
A.S.A. 1947, § 68-1150.

#### **4-59-305. Inducing carrier to issue bill when goods have not been received.**

Any person who with intent to defraud secures the issue by a carrier of a bill, knowing that at the time of the issue any or all of the goods described in the bill as received for transportation have not been received by the carrier, or an agent of the carrier or a connecting carrier, or are not under the carrier's control, by inducing an officer, agent, or servant of the carrier falsely to believe that the goods have been received by the carrier or are under its control, shall be guilty of a crime and upon conviction shall be punished for each offense by imprisonment not exceeding five (5) years or by a fine not exceeding five thousand dollars (\$5,000), or by both.

**History.** Acts 1941, No. 264, § 49;  
A.S.A. 1947, § 68-1149.

#### **4-59-306. Negotiation of bill for unowned or mortgaged goods.**

Any person who ships goods to which he or she does not have title or upon which there is a lien or mortgage and who takes for such goods a negotiable bill which he or she afterwards negotiates for value with intent to deceive and without disclosing his or her want of title or the existence of the lien or mortgage shall be guilty of a Class A misdemeanor.

**History.** Acts 1941, No. 264, § 47;  
A.S.A. 1947, § 68-1147; Acts 2005, No.  
1994, § 215.

#### **4-59-307. Negotiation of bill when goods are not in carrier's possession.**

Any person who with intent to deceive negotiates or transfers for value a bill, knowing that any or all of the goods which by the terms of the bill appear to have been received for transportation by the carrier which issued the bill are not in the possession or control of the carrier

or of a connecting carrier, without disclosing this fact, shall be guilty of a crime and upon conviction shall be punished for each offense by imprisonment not exceeding five (5) years or by a fine not exceeding five thousand dollars (\$5,000), or by both.

**History.** Acts 1941, No. 264, § 48;  
A.S.A. 1947, § 68-1148.

#### SUBCHAPTER 4 — WAREHOUSE RECEIPTS

##### SECTION.

- 4-59-401. Issuance of receipt for goods not received or controlled.  
4-59-402. Fraudulent issuance of receipt containing false statement.  
4-59-403. Issuance of duplicate receipt not so marked.  
4-59-404. Issuance of receipt for goods owned by warehouseman

##### SECTION.

- without statement of ownership.  
4-59-405. Delivering goods without obtaining negotiable receipt.  
4-59-406. Negotiation of receipt by depositor of encumbered or another's goods without disclosing facts.

**Publisher's Notes.** Commentary regarding the Uniform Warehouse Receipts Act, see Commentaries Volume A.

**Effective Dates.** Acts 1915, No. 273, § 61: Sept. 1, 1915.

#### 4-59-401. Issuance of receipt for goods not received or controlled.

A warehouseman or any officer, agent, or servant of a warehouseman, who issues or aids in issuing a receipt, knowing that the goods for which the receipt is issued have not been actually received by the warehouseman or are not under his actual control at the time of issuing the receipt, shall be guilty of a crime and upon conviction shall be punished for each offense by imprisonment not exceeding five (5) years or by a fine not exceeding five thousand dollars (\$5,000), or by both.

**History.** Acts 1915, No. 273, § 50; C. & M. Dig., § 10394; Pope's Dig., § 14462;  
A.S.A. 1947, § 68-1250.

#### 4-59-402. Fraudulent issuance of receipt containing false statement.

A warehouseman or any officer, agent, or servant of a warehouseman, who fraudulently issues or aids in fraudulently issuing a receipt for goods, knowing that it contains any false statement, shall be guilty of a Class A misdemeanor.

**History.** Acts 1915, No. 273, § 51; C. & A.S.A. 1947, § 68-1251; Acts 2005, No. M. Dig., § 10395; Pope's Dig., § 14463; 1994, § 216.

#### **4-59-403. Issuance of duplicate receipt not so marked.**

A warehouseman or any officer, agent, or servant of a warehouseman who issues or aids in issuing a duplicate or additional negotiable receipt for goods, knowing that a former negotiable receipt for the same goods or any part of them is outstanding and uncanceled, without plainly placing upon the face thereof the word "Duplicate" shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding five (5) years or by a fine not exceeding five thousand dollars (\$5,000), or by both.

**History.** Acts 1915, No. 273, § 52; C. & M. Dig., § 10396; Pope's Dig., § 14464; A.S.A. 1947, § 68-1252.

#### **4-59-404. Issuance of receipt for goods owned by warehouseman without statement of ownership.**

Where there are deposited with or held by a warehouseman goods of which he or she is owner, either solely, jointly, or in common with others, the warehouseman or any of his or her officers, agents, or servants who knowing of his or her ownership issue or aid in issuing a negotiable receipt for the goods which does not state the ownership, shall be guilty of a Class A misdemeanor.

**History.** Acts 1915, No. 273, § 53; C. & A.S.A. 1947, § 68-1253; Acts 2005, No. M. Dig., § 10397; Pope's Dig., § 14465; 1994, § 217.

#### **4-59-405. Delivering goods without obtaining negotiable receipt.**

A warehouseman or any officer, agent, or servant of a warehouseman who delivers goods out of the possession of the warehouseman without obtaining the possession of the receipt at or before the time of the delivery, knowing that a negotiable receipt, the negotiation of which would transfer the right to the possession of the goods, is outstanding and uncanceled shall be guilty of a Class A misdemeanor.

**History.** Acts 1915, No. 273, § 54; C. & A.S.A. 1947, § 68-1254; Acts 2005, No. M. Dig., § 10398; Pope's Dig., § 14466; 1994, § 217.

#### **4-59-406. Negotiation of receipt by depositor of encumbered or another's goods without disclosing facts.**

Any person who deposits goods to which he or she has no title or upon which there is a lien or mortgage, and who takes for the goods a negotiable receipt which he or she afterward negotiates for value with intent to deceive and without disclosing his or her want of title or the

existence of the lien or mortgage, shall be guilty of a Class A misdemeanor.

**History.** Acts 1915, No. 273, § 55; C. & A.S.A. 1947, § 68-1255; Acts 2005, No. M. Dig., § 10399; Pope's Dig., § 14467; 1994, § 217.

## SUBCHAPTER 5 — FACTORING OF FINANCIAL TRANSACTION CARD RECORDS OF SALE

### SECTION.

4-59-501. Definitions.

4-59-502. Remission to acquirer of record  
of sale not made by remit-  
ter.

### SECTION.

4-59-503. Solicitation of merchant to re-  
mit record of sale not made  
by merchant.

### 4-59-501. Definitions.

The following words and phrases as used in this subchapter, unless a different meaning is plainly required by the context, shall have the following meanings:

(1) "Acquirer" means a business organization, financial institution, or an agent of a business organization or financial institution that authorizes a merchant to accept payment by financial transaction card for money, goods, services, or anything else of value;

(2) "Cardholder" means the person or organization named on the face of a financial transaction card to whom or for whose benefit the financial transaction card is issued by an issuer;

(3) "Financial transaction card" means any instrument or device, whether known as a credit card, credit plate, bank services card, banking card, check guarantee card, debit card, or by any other name, issued with or without fee by an issuer for the use of the cardholder:

(A) In obtaining money, goods, services, or anything else of value on credit; or

(B) In certifying or guaranteeing to a person or business the availability to the cardholder of funds on deposit that are equal to or greater than the amount necessary to honor a draft or check payable to the order of such person or business; or

(C) In providing the cardholder access to a demand deposit account or time deposit account for the purpose of:

(i) Making deposits of money or checks therein; or

(ii) Withdrawing funds in the form of money, money orders, or traveler's checks therefrom; or

(iii) Transferring funds from any demand deposit account or time deposit account to any other demand deposit account or time deposit account; or

(iv) Transferring funds from any demand deposit account or time deposit account to any credit card accounts, overdraft privilege accounts, loan accounts, or any other credit accounts in full or partial satisfaction of any outstanding balance owed existing therein; or

(v) For the purchase of goods, services, or anything else of value; or

- (vi) Obtaining information pertaining to any demand deposit account or time deposit account; and
- (4) "Issuer" means the business organization or financial institution or its duly authorized agent which issues a financial transaction card.

**History.** Acts 1991, No. 785, § 1.

**4-59-502. Remission to acquirer of record of sale not made by remitter.**

(a) A person authorized by an acquirer to furnish money, goods, services, or anything else of value upon presentation of a financial transaction card or a financial transaction card account number by a cardholder, or any agent or employee of such person, who, with intent to defraud the issuer, acquirer, or cardholder, remits to an issuer or acquirer, for payment, a financial transaction card record of a sale, which sale was not made by such person, his or her agent or employee, is guilty of financial transaction card fraud.

(b) Any person violating this section is guilty of a Class C felony.

**History.** Acts 1991, No. 785, § 2.

**4-59-503. Solicitation of merchant to remit record of sale not made by merchant.**

Any person who, without the acquirer's express authorization, employs or solicits an authorized merchant, or any agent or employee of such merchant, to remit to an issuer or acquirer, for payment, a financial transaction card record of sale, which sale was not made by such merchant, his or her agent, or employee, is guilty of a Class C felony.

**History.** Acts 1991, No. 785, § 3.

## CHAPTER 60

### CHECKS

SECTION.

4-60-101. Definitions.

4-60-102. Applicability.

SECTION.

4-60-103. Liability for restitution.

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**Cross References.** Negotiable instruments, generally, § 4-3-101 et seq.

**Effective Dates.** Acts 2001, No. 996, § 5: Mar. 21, 2001. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that the incidents of people writing 'hot checks' continue to increase; that the costs associated with the processing of

and collecting on 'hot checks' have continued to increase; that the holders of those 'hot checks' are entitled to recover those increasing costs; that current law does not allow adequate recovery of the costs associated with 'hot checks' by their holders. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public

peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the

period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

### RESEARCH REFERENCES

**U. Ark. Little Rock L.J.** Survey—Miscellaneous, 10 U. Ark. Little Rock L.J. 593.

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#### 4-60-101. Definitions.

As used in this chapter, unless the context otherwise requires:

(1) "Check" means a written unconditional order to pay a sum certain in money drawn on a bank payable on demand and signed by the drawer;

(2) "Drawee" means the bank or purported bank upon which a check is drawn;

(3) "Drawer" means a person, either real or fictitious, whose name appears on a check as the primary obligor, whether the actual signature is that of himself or herself or a person authorized to draw the check in his or her behalf; and

(4) "Issue" means make, draw, deliver, or pass a check.

**History.** Acts 1987, No. 66, § 1.

**Cross References.** Arkansas Hot Check Law, § 5-37-301 et seq.

#### 4-60-102. Applicability.

This chapter does not apply to the laws governing the imposition of a penalty for checks written on accounts which have insufficient funds and which checks are payable to either the Director of the Department of Finance and Administration or to the Department of Finance and Administration for any taxes, licenses, or fees imposed by any laws of this state.

**History.** Acts 1987, No. 66, § 3.

#### 4-60-103. Liability for restitution.

(a) A person who issues a check that is not paid because the check was written on an account with insufficient funds has fifteen (15) days following the date of a written demand mailed or delivered to the drawer of the check at the address shown on the check or his or her last known address to pay to the holder of the check or his or her agent the amount of the check and a collection fee not to exceed thirty dollars

(\$30.00), plus the amount of any fees charged to the holder of the check by a financial institution as a result of the check's not being honored.

(b)(1) A person who fails to make restitution as set forth in subsection (a) of this section and who fails to pay the amount of the check and a collection fee not to exceed thirty dollars (\$30.00), plus the amount of any fees charged to the holder of the check by a financial institution as a result of the check's not being honored, within thirty (30) days following the date of a written demand mailed to the drawer by certified mail, return receipt requested, to the address shown on the check or his or her last known address is liable to the holder of the check or his or her agent for:

(A) Twice the amount of the check, but in no case less than fifty dollars (\$50.00); and

(B) A collection fee not to exceed thirty dollars (\$30.00), plus the amount of any fees charged to the holder of the check by any financial institution as a result of the check's not being honored.

(2) The prevailing party may recover court costs and reasonable attorney's fees after suit has been filed.

(c)(1) This section does not prevent the criminal prosecution of the person who issues the check.

(2) However, any payment made by the defendant to a victim under an order for restitution entered in a criminal prosecution shall be set off against any judgment in favor of the victim in a civil action brought under this section arising out of the same facts or event.

**History.** Acts 1987, No. 66, § 2; 1995, No. 335, § 1; 1995, No. 1004, § 1; 2001, No. 996, § 1; 2011, No. 1012, § 1.

**Amendments.** The 2011 amendment substituted "thirty dollars (\$30.00)" for

"twenty-five-dollars (\$25.00) in (a), (b)(1), and (b)(1)(B); deleted (b)(1)(C); substituted "This section does not" for "Nothing in this section" in (c)(1); and substituted "under" for "pursuant to" in (c)(2).

## CASE NOTES

### Restitution in Cash.

The restitution contemplated in this section is in cash. *Sturgis v. Lee Apparel Co.*, 304 Ark. 235, 800 S.W.2d 719 (1990).

Where merchandise was returned to a seller because the buyer was going out of business, not in restitution of the dishon-

ored check buyer used to pay seller for merchandise, there was no restitution in cash as contemplated by this section. *Sturgis v. Lee Apparel Co.*, 304 Ark. 235, 800 S.W.2d 719 (1990).

**Cited:** *Cheqnet Sys. v. Montgomery*, 322 Ark. 742, 911 S.W.2d 956 (1995).

## CHAPTERS 61-69

[Reserved]

SUBTITLE 6. BUSINESS PRACTICES

CHAPTER 70  
GENERAL PROVISIONS

SUBCHAPTER.

- 1. RIGHTS GENERALLY.
- 2. BUSINESS UNDER ASSUMED NAME.
- 3. SALES REPRESENTATIVES.

SUBCHAPTER 1 — RIGHTS GENERALLY

SECTION.

- 4-70-101. [Repealed.]
- 4-70-102. Advertisement by giving away prizes lawful.

SECTION.

- 4-70-103. Tickets sold over the Internet.

**Effective Dates.** Acts 1959, No. 169, § 5: Mar. 4, 1959. Emergency clause provided: “It has been found and is declared by the General Assembly of Arkansas that there is an urgent need to provide a more effective method of preserving the public peace in various business and professional establishments in the State, and that en-

actment of this bill will provide for a more efficient method. Therefore, an emergency is declared to exist, and this act being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from the date of its approval.”

4-70-101. [Repealed.]

**Publisher’s Notes.** This section, concerning the right to select customers and the penalty for a customer’s failure to comply, was repealed by Acts 2005, No.

1994, § 534. The section was derived from Acts 1959, No. 169, §§ 1-3; A.S.A. 1947, §§ 71-1801 — 71-1803.

RESEARCH REFERENCES

**Ark. L. Notes.** Brill, Arkansas Law of Damages, Fifth Edition, Chapter 30: Real Property, 2004 Arkansas L. Notes 9.

4-70-102. Advertisement by giving away prizes lawful.

The method of business advertising conducted in this state by the giving away of prizes consisting of money or other thing of value where no payment of money or other thing of value is required of participants in the awards, whether the advertising plan is entitled “Bank Night”,

“Buck Night”, or any other name whatsoever, is declared to be a legal form of advertising.

**History.** Acts 1937, No. 238, § 1; Pope’s Dig., § 13396; A.S.A. 1947, § 71-1804.

### CASE NOTES

**Cited:** *Casteel v. K. Lee Williams Theatres, Inc.*, 221 Ark. 935, 256 S.W.2d 732 (1953).

#### 4-70-103. Tickets sold over the Internet.

(a) Tickets of admission to a live entertainment event, theatre, musical performance, or place of public entertainment or amusement of any kind shall not be offered for sale by any person over the Internet until the tickets have first been offered for sale to the public via an event-authorized outlet or offering.

(b) Internet portals or websites shall not allow any person to offer for resale any ticket of admission to a live entertainment event, theatre, musical performance, or place of public entertainment or amusement of any kind until the tickets have first been offered for sale to the public via an event-authorized outlet or offering.

(c) This section shall not apply to sporting or athletic events.

**History.** Acts 2009, No. 573, § 1.

### SUBCHAPTER 2 — BUSINESS UNDER ASSUMED NAME

#### SECTION.

4-70-201. Applicability of subchapter.

4-70-202. Penalties.

4-70-203. Doing business under assumed name — Certificate.

4-70-204. Certificate of withdrawal from or disposition of interest in business.

#### SECTION.

4-70-205. Certified copy of certificate as presumptive evidence.

4-70-206. Clerk’s index and filing fees.

**Effective Dates.** Acts 1997, No. 479, § 16: Mar. 13, 1997. Emergency clause provided: “It is hereby found and determined by the General Assembly of the State of Arkansas that the limited liability company statute and other acts relating to pass through entities and related laws need amending in order to better reflect the intent and operation of those laws as originally drafted and to be consistent with current trends. Therefore an emergency is declared to exist and this act being immediately necessary for the pres-

ervation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto. Notwithstanding the foregoing, SECTION 10 of this act (§ 4-32-802(c)) shall only apply to limited liability compa-

nies in exsistence [sic] on the effective date of this act in the event an election is made with the Secretary of State to have this provision apply; otherwise, the original § 4-32-802(c) shall apply to limited liability companies existing on the effective date of this act."

Acts 1997, No. 912, § 16: March 28, 1997. Emergency clause provided: "It is hereby found and determined by the General Assembly of the State of Arkansas that the general and limited partners statues [sic] need amending in order to be consistent with current trends. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the immediate preservation of the public peace, health, and safety, shall be in full force and effect from and after its passage and approval."

Acts 1999, No. 1528, § 13: Apr. 15, 1999. Emergency clause provided: "It is hereby found and determined by the Eighty-second General Assembly that the Small Business Entity Tax Pass Through Act and the Revised Limited Partnership

Act of 1991 and other related acts and related laws need amending in order to better reflect the intent and operation of those laws. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto. Notwithstanding the foregoing, Section 4 of this act shall only apply to limited liability companies in existence on the effective date of this act in the event an election is made with the Secretary of State to have this provision apply; otherwise, the original § 4-32-802, as amended, shall apply to limited liability companies existing on the effective date of this act."

## RESEARCH REFERENCES

**ALR.** Use of assumed or trade name as ground for disciplining attorney. 26 A.L.R.4th 1083.

Validity and construction of state statute or rule allowing or changing rate of prejudgment interest in tort actions. 40 A.L.R.4th 147.

Retrospective application and effect of state statute or rule allowing interest or changing rate of interest on judgments or verdicts. 41 A.L.R.4th 694.

Right to sue for infringement of trade-name as affected by violation of statute as to doing business under an assumed or fictitious name or designation not showing the names of the persons interested. 42

ALR 4th 542.

Applicability of Article 9 of Uniform Commercial Code to assignment of rights under real-estate sales contracts, lease agreements, or mortgage as collateral for separate transaction. 76 A.L.R.4th 765.

Enforceability of contract to share winnings from legal lottery ticket. 90 A.L.R.4th 784.

Enforceability, by purchaser or successor of business, of covenant not to compete entered into by predecessor and its employees. 12 A.L.R.5th 847.

## 4-70-201. Applicability of subchapter.

(a) This subchapter shall not apply to any limited partnership which has filed its certificate of limited partnership with the Secretary of State pursuant to § 4-47-201 or any successor law.

(b) This subchapter shall not apply to any domestic or foreign corporation or to any domestic or foreign limited partnership or limited liability company lawfully doing business in this state.

(c) This subchapter shall not apply to any limited liability company which has filed its articles of organization with the Secretary of State pursuant to § 4-32-202.

**History.** Acts 1943, No. 11, § 4; 1977, No. 874, § 3; A.S.A. 1947, §§ 70-404, 70-406; Acts 1997, No. 479, § 7; 1997, No. 549, § 1; 1997, No. 912, § 12; 1999, No. 1528, § 7; 2007, No. 15, § 7.

**Amendments.** The 2007 amendment substituted “4-47-201” for “4-43-201” in (a); and deleted (d).

## 4-70-202. Penalties.

(a) Any person owning, carrying on, or transacting business as designated in this subchapter who fails to comply with any provision of this subchapter shall be guilty of a violation and fined not less than twenty-five dollars (\$25.00) nor more than one hundred dollars (\$100).

(b) Each day of the violation shall be a separate offense.

**History.** Acts 1943, No. 11, § 5; A.S.A. 1947, § 70-405; Acts 2005, No. 1994, § 38.

## CASE NOTES

### Civil Actions.

Failure of partnership to record trade name does not bar partner from maintaining suit for damages for commission of

tort, since only a fine is imposed for failure to record trade name. *Arnold Barber & Beauty Supply Co. v. Provance*, 221 Ark. 385, 253 S.W.2d 367 (1952).

## 4-70-203. Doing business under assumed name — Certificate.

(a) No person shall conduct or transact business in this state under an assumed name or under any designated name or style, corporate or otherwise, other than the real name of the individual conducting or transacting such business, unless the person files a certificate in the office of the county clerk of the counties in which the person conducts or transacts or intends to conduct the business. The certificate shall set forth the name under which the business is, or is to be, conducted or transacted and the full name or names of each person conducting or transacting the business, with the post office address of each.

(b) The certificate shall be executed and duly acknowledged by the persons so conducting or intending to conduct the business in the manner provided for in acknowledgment of conveyances of real estate.

**History.** Acts 1943, No. 11, § 1; A.S.A. 1947, § 70-401.

**Publisher's Notes.** Acts 1999, No. 1528, § 9, provided: “The fictitious name provisions for limited liability companies, limited partnerships, and limited liability partnerships in Sections 1, 3 and 5 of this

act [codified as §§ 4-32-108, 4-43-108, 4-42-707] shall not be applicable to any name for which an assumed name filing has been made under § 4-70-203 prior to the effective date of this act.”

**Cross References.** Going out of business sales, § 4-74-101 et seq.

**4-70-204. Certificate of withdrawal from or disposition of interest in business.**

Wherever there is a change in ownership of any business operated under an assumed name, each person disposing of his or her interest in the business or withdrawing therefrom shall file a certificate with the county clerk of each county in which the business is being conducted. This certificate shall set forth the fact of the withdrawal from or disposition of interest in the business and shall be executed and duly acknowledged as directed in § 4-70-203.

**History.** Acts 1943, No. 11, § 2; A.S.A. 1947, § 70-402.

**4-70-205. Certified copy of certificate as presumptive evidence.**

A copy of the certificate duly certified by the county clerk in whose office the certificate was filed shall be presumptive evidence in all courts in this state of the facts therein contained.

**History.** Acts 1943, No. 11, § 3; A.S.A. 1947, § 70-403.

**4-70-206. Clerk's index and filing fees.**

(a) Each county clerk shall keep an alphabetical index of persons filing certificates provided for in this subchapter.

(b) For indexing and filing the certificate, the clerk shall receive a fee of one dollar (\$1.00).

**History.** Acts 1943, No. 11, § 3; A.S.A. 1947, § 70-403.

**SUBCHAPTER 3 — SALES REPRESENTATIVES****SECTION.**

4-70-301. Definitions.

4-70-302. Sales representatives' contracts — Limitation.

4-70-303. Payment in absence of contract.

**SECTION.**

4-70-304. Jurisdiction.

4-70-305. Waivers prohibited.

4-70-306. Damages and attorney's fees.

**4-70-301. Definitions.**

As used in this subchapter, unless the context otherwise requires:

(1) "Commission" means compensation paid a sales representative by a principal in an amount based on a percentage of the dollar amount of certain orders for, or sales of, the principal's product;

(2) "Principal" means a person who:

(A) Does not have a permanent or fixed place of business in this state;

(B) Manufactures, produces, imports, or distributes a product for sale to customers who purchase the product for resale;

(C) Uses a sales representative to solicit orders for the product; and

(D) Compensates the sales representative in whole or in part by commission; and

(3) "Sales representative" means a person who solicits on behalf of a principal orders for the purchase at wholesale of the principal's product. The term "sales representative" does not include a person who places orders for or purchases the product for his or her own account for resale, or is engaged in door-to-door sales regulated by § 4-89-101 et seq.

**History.** Acts 1989, No. 464, § 1.

#### **4-70-302. Sales representatives' contracts — Limitation.**

(a) A contract between a principal and a sales representative under which the sales representative is to solicit wholesale orders within this state must be in writing and set forth the method by which the sales representative's commission is to be computed and paid.

(b) The principal shall provide the sales representative with a copy of the contract.

(c) A provision in the contract establishing venue for an action arising under the contract in a state other than this state is void.

**History.** Acts 1989, No. 464, § 1.

#### **4-70-303. Payment in absence of contract.**

If a compensation agreement between a sales representative and a principal that is not in writing is terminated, the principal shall pay all commissions due the sales representative within thirty (30) working days after the date of the termination.

**History.** Acts 1989, No. 464, § 1.

#### **4-70-304. Jurisdiction.**

A principal who is not a resident of this state and who enters into a contract subject to this subchapter is considered to be doing business in this state for purposes of the exercise of personal jurisdiction over the principal.

**History.** Acts 1989, No. 464, § 1.

#### **4-70-305. Waivers prohibited.**

A provision of this subchapter may not be waived, whether by express waiver or by attempt to make a contract or agreement subject to the laws of another state. A waiver of a provision of this subchapter is void.

**History.** Acts 1989, No. 464, § 1.

**4-70-306. Damages and attorney's fees.**

A principal who fails to comply with a provision of a contract under § 4-70-302 relating to payment of a commission or fails to pay a commission as required by § 4-70-303 is liable to the sales representative in a civil action for three (3) times the damages sustained by the sales representative, plus reasonable attorney's fees and costs.

**History.** Acts 1989, No. 464, § 1.

## CHAPTER 71

### TRADEMARKS AND LABELS

#### SUBCHAPTER.

1. GENERAL PROVISIONS. [REPEALED.]
2. REGISTRATION AND PROTECTION.

#### RESEARCH REFERENCES

**Am. Jur.** 74 Am. Jur. 2d, Trademark, § 1 et seq.

**C.J.S.** 87 C.J.S., Trademarks, etc., § 2 et seq.

**ALR.** Trademark licensor's liability for injury or death allegedly due to defect in licensed product, 90 A.L.R.4th 981.

#### SUBCHAPTER 1 — GENERAL PROVISIONS

#### SECTION.

4-71-101 — 4-71-114. [Repealed.]

**4-71-101 — 4-71-114. [Repealed.]**

**Publisher's Notes.** This subchapter was repealed by Acts 2001, No. 1553, § 4. The subchapter was derived from the following sources:

4-71-101. Acts 1967, No. 81, § 1; A.S.A. 1947, § 70-539.

4-71-102. Acts 1967, No. 81, § 14; A.S.A. 1947, § 70-552.

4-71-103. Acts 1967, No. 81, § 9; A.S.A. 1947, § 70-547.

4-71-104. Acts 1967, No. 81, § 2; A.S.A. 1947, § 70-540.

4-71-105. Acts 1967, No. 81, § 3; A.S.A. 1947, § 70-541; 1989, No. 894, § 1.

4-71-106. Acts 1967, No. 81, § 4; A.S.A. 1947, § 70-542.

4-71-107. Acts 1967, No. 81, § 10; A.S.A. 1947, § 70-548.

4-71-108. Acts 1967, No. 81, § 5; A.S.A. 1947, § 70-543; 1989, No. 894, § 2.

4-71-109. Acts 1967, No. 81, § 8; A.S.A. 1947, § 70-546.

4-71-110. Acts 1967, No. 81, § 6; A.S.A. 1947, § 70-544.

4-71-111. Acts 1967, No. 81, § 7; A.S.A. 1947, § 70-545.

4-71-112. Acts 1967, No. 81, § 11; A.S.A. 1947, § 70-549.

4-71-113. Acts 1967, No. 81, § 12; A.S.A. 1947, § 70-550.

4-71-114. Acts 1967, No. 81, § 13; A.S.A. 1947, § 70-551.

For present law, see § 4-71-201 et seq.

## SUBCHAPTER 2 — REGISTRATION AND PROTECTION

## SECTION.

- 4-71-201. Definitions.
- 4-71-202. Registrability.
- 4-71-203. Application for registration.
- 4-71-204. Filing of applications.
- 4-71-205. Certificate of registration.
- 4-71-206. Duration and renewal.
- 4-71-207. Assignments, changes of name,  
and other instruments.
- 4-71-208. Records.
- 4-71-209. Cancellation.
- 4-71-210. Classification.
- 4-71-211. Fraudulent registration.

## SECTION.

- 4-71-212. Infringement.
- 4-71-213. Injury to business reputation  
— Dilution.
- 4-71-214. Remedies.
- 4-71-215. Forum for actions regarding  
registration — Service on  
out-of-state registrants.
- 4-71-216. Common law rights.
- 4-71-217. Fees.
- 4-71-218. Repeal of prior acts — Intent of  
subchapter.

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### RESEARCH REFERENCES

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| <p><b>Ark. L. Rev.</b> Lyon &amp; Look, How Intellectual Property Impacts a Commercial</p> | <p><b>Law Practice: Trademarks and Service Marks</b>, 51 Ark. L. Rev. 459.</p> |
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#### 4-71-201. Definitions.

As used in this subchapter:

(1) A mark shall be deemed to be “abandoned” when either of the following occurs:

(A)(i)(a) When its use has been discontinued with intent not to resume such use.

(b) Intent not to resume may be inferred from circumstances.

(ii) Nonuse for two (2) consecutive years shall constitute prima facie evidence of abandonment; or

(B) When any course of conduct of the owner, including acts of omission as well as commission, causes the mark to lose its significance as a mark;

(2) “Applicant” means the person filing an application for registration of a mark under this subchapter and the legal representatives, successors, or assigns of such person;

(3) “Dilution” means the lessening of the capacity of a famous mark to identify and distinguish goods or services, regardless of the presence or absence of:

(A) Competition between the owner of the famous mark and other parties; or

(B) A likelihood of confusion, mistake, or deception;

(4) “Mark” includes any trademark or service mark entitled to registration under this subchapter whether registered or not;

(5)(A) “Person” and any other word or term used to designate the applicant or other party entitled to a benefit or privilege or rendered

liable under the provisions of this subchapter includes a juristic person as well as a natural person.

(B) The term “juristic person” includes a firm, partnership, corporation, union, association, or other organization capable of suing and being sued in a court of law;

(6) “Registrant” means the person to whom the registration of a mark under this subchapter is issued and the legal representatives, successors, or assigns of such person;

(7) “Secretary” means the Secretary of State or the designee of the Secretary of State charged with the administration of this subchapter;

(8)(A) “Service mark” means any word, name, symbol, or device or any combination thereof used by a person to identify and distinguish the services of one (1) person, including a unique service, from the services of others, and to indicate the source of the services, even if that source is unknown.

(B) Titles, character names used by a person, and other distinctive features of radio or television programs may be registered as service marks notwithstanding that they, or the programs, may advertise the goods of the sponsor;

(9) “Trade name” means any name used by a person to identify a business or vocation of such person;

(10) “Trademark” means any word, name, symbol, or device or any combination thereof used by a person to identify and distinguish the goods of such person, including a unique product, from those manufactured or sold by others, and to indicate the source of the goods, even if that source is unknown; and

(11)(A) “Use” means the bona fide use of a mark in the ordinary course of trade and not made merely to reserve a right in a mark.

(B) For the purposes of this subchapter, a mark shall be deemed to be in use:

(i) On goods when it is placed in any manner on the goods or other containers or the displays associated therewith or on the tags or labels affixed thereto, or if the nature of the goods makes such placement impracticable, then on documents associated with the goods or their sale and the goods are sold or transported in commerce in this state; and

(ii) On services when it is used or displayed in the sale or advertising of services and the services are rendered in this state.

**History.** Acts 1997, No. 1109, § 1.

## RESEARCH REFERENCES

**U. Ark. Little Rock L. Rev.** Resolving the Circuit Split on Standing in False Advertising Claims and Incorporation of Prudential Standing in State Deceptive

**Trade Practices Law: The Quest for Optimal Levels of Accurate Information in the Marketplace,** 29 U. Ark. Little Rock L. Rev. 283.

**4-71-202. Registrability.**

A mark by which the goods or services of any applicant for registration may be distinguished from the goods or services of others shall not be registered if it:

(1) Consists of or comprises immoral, deceptive, or scandalous matter;

(2) Consists of or comprises matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt or disrepute;

(3) Consists of or comprises the flag or coat of arms or other insignia of the United States, any state or municipality, or any foreign nation, or any simulation;

(4) Consists of or comprises the name, signature, or portrait identifying a particular living individual, except by the individual's written consent;

(5)(A) Consists of a mark which:

(i) When used on or in connection with the goods or services of the applicant, is merely descriptive or deceptively misdescriptive of them;

(ii) When used on or in connection with the goods or services of the applicant is primarily geographically descriptive or deceptively misdescriptive of them; or

(iii) Is primarily merely a surname.

(B)(i) Provided, however, that nothing in this subdivision (5) shall prevent the registration of a mark used by the applicant which has become distinctive of the applicant's goods or services.

(ii) The Secretary of State may accept as evidence that the mark has become distinctive, as used on or in connection with the applicant's goods or services, proof of continuous use as a mark by the applicant in this state for the five (5) years before the date on which the claim of distinctiveness is made; or

(6) Consists of or comprises a mark which so resembles a mark registered in this state or a mark or trade name previously used by another and not abandoned as to be likely, when used on or in connection with the goods or services of the applicant, to cause confusion or mistake or to deceive.

**History.** Acts 1997, No. 1109, § 2.

**RESEARCH REFERENCES**

**ALR.** Reverse confusion doctrine under state trademark law. 114 A.L.R.5th 129.

**4-71-203. Application for registration.**

(a) Subject to the limitations set forth in this subchapter, any person who uses a mark may file in the office of the Secretary of State, in a manner complying with the requirements of the Secretary of State, an

application for registration of that mark setting forth, but not limited to, the following information:

(1) The name and business address of the person applying for such registration and, if a corporation, the state of incorporation, or if a partnership, the state in which the partnership is organized and the names of the general partners, as specified by the Secretary of State;

(2) The goods or services on or in connection with which the mark is used and the mode or manner in which the mark is used on or in connection with such goods or services and the class in which such goods or services fall;

(3) The date when the mark was first used anywhere and the date when it was first used in this state by the applicant or predecessor in interest; and

(4) A statement that the applicant is the owner of the mark, that the mark is in use, and that, to the knowledge of the person verifying the application, no other person has registered, either federally or in this state, or has the right to use such mark either in the identical form thereof or in such near resemblance thereto as to be likely, when applied to the goods or services of such other person, to cause confusion or mistake or to deceive.

(b)(1) The Secretary of State may also require a statement as to whether an application to register the mark, or portions or a composite thereof, has been filed by the applicant or a predecessor in interest in the United States Patent and Trademark Office and, if so, the applicant shall provide full particulars with respect thereto, including the filing date and serial number of each application, the status thereof, and, if any application was finally refused registration or has otherwise not resulted in registration, the reasons therefor.

(2) The Secretary of State may also require that a drawing of the mark, complying with such requirements as the Secretary of State may specify, accompany the application.

(3) The application shall be signed and verified by oath, affirmation, or declaration subject to perjury laws by the applicant or by a member of the firm or an officer of the corporation or association applying.

(4) The application shall be accompanied by three (3) specimens showing the mark as actually used.

(5) The application shall be accompanied by the application fee payable to the Secretary of State.

**History.** Acts 1997, No. 1109, § 3.

## CASE NOTES

## ANALYSIS

"In This State".  
Legislative Intent.

**"In This State".**

Former § 4-71-105 (see now subdivision (a)(4) of this section) does not empower the Secretary of State to register trademarks or service marks for a limited geographical area within, but smaller than, the entire state. *Worthen Nat'l Bank v.*

*McCuen*, 317 Ark. 195, 876 S.W.2d 567 (1994).

**Legislative Intent.**

The intent of the drafters of former § 4-71-105 (see now subdivision (a)(4) of this section) was that a registered mark be one to which the owner has exclusive rights in the entire state. *Worthen Nat'l Bank v. McCuen*, 317 Ark. 195, 876 S.W.2d 567 (1994).

**4-71-204. Filing of applications.**

(a) Upon the filing of an application for registration and payment of the application fee, the Secretary of State may cause the application to be examined for conformity with this subchapter.

(b) The applicant shall provide any additional pertinent information requested by the Secretary of State, including a description of a design mark, and may make or authorize the Secretary of State to make such amendments to the application as may be reasonably requested by the Secretary of State or deemed by the applicant to be advisable to respond to any rejection or objection.

(c)(1) The Secretary of State may require the applicant to disclaim an unregistrable component of a mark otherwise registrable, and an applicant may voluntarily disclaim a component of a mark sought to be registered.

(2) No disclaimer shall prejudice or affect the applicant's or registrant's rights then existing or thereafter arising in the disclaimed matter or the applicant's or registrant's rights of registration on another application if the disclaimed matter is or shall have become distinctive of the applicant's or registrant's goods or services.

(d) Amendments may be made by the Secretary of State upon the application submitted by the applicant upon the applicant's agreement or a fresh application may be required to be submitted.

(e)(1) If the applicant is found not to be entitled to registration, the Secretary of State shall advise the applicant thereof and of the reasons therefor.

(2)(A) The applicant shall have a reasonable period of time specified by the Secretary of State in which to reply or to amend the application, in which event the application shall then be reexamined.

(B) This procedure may be repeated until:

(i) The Secretary of State finally refuses registration of the mark;  
or

(ii) The applicant fails to reply or amend within the specified period, whereupon the application shall be deemed to have been abandoned.

(f)(1) If the Secretary of State finally refuses registration of the mark, the applicant may seek a writ of mandamus to compel such registration.

(2) Such writ may be granted, but without costs to the Secretary of State, on proof that all the statements in the application are true and that the mark is otherwise entitled to registration.

(g)(1) In the instance of applications concurrently being processed by the Secretary of State seeking registration of the same or confusingly similar marks for the same or related goods or services, the Secretary of State shall grant priority to the applications in order of filing.

(2)(A) If a prior-filed application is granted a registration, the other application or applications shall then be rejected.

(B) Any rejected applicant may bring an action for cancellation of the registration upon grounds of prior or superior rights to the mark, in accordance with the provisions of § 4-71-209.

**History.** Acts 1997, No. 1109, § 4.

#### **4-71-205. Certificate of registration.**

(a) Upon compliance by the applicant with the requirements of this subchapter, the Secretary of State shall cause a certificate of registration to be issued and delivered to the applicant.

(b) The certificate of registration shall be issued under the signature of the Secretary of State and the seal of the state, and it shall show the name and business address and, if a corporation, the state of incorporation, or if a partnership, the state in which the partnership is organized and the names of the general partners, as specified by the Secretary of State, of the person claiming ownership of the mark, the date claimed for the first use of the mark anywhere and the date claimed for the first use of the mark in this state, the class of goods or services and a description of the goods or services on or in connection with which the mark is used, a reproduction of the mark, the registration date, and the term of the registration.

(c) Any certificate of registration issued by the Secretary of State under the provisions hereof or a copy thereof duly certified by the Secretary of State shall be admissible in evidence as competent and sufficient proof of the registration of a mark in any actions or judicial proceedings in any court of this state.

**History.** Acts 1997, No. 1109, § 5.

#### **4-71-206. Duration and renewal.**

(a)(1) A registration of a mark under this subchapter shall be effective for a term of five (5) years from the date of registration and, upon application filed within six (6) months prior to the expiration of that term, in a manner complying with the requirements of the Secretary of State, the registration may be renewed for a like term from the end of the expiring term.

(2) A renewal fee, payable to the Secretary of State, shall accompany the application for renewal of the registration.

(3) A registration may be renewed for successive periods of five (5) years in like manner.

(b) Any registration in force on August 1, 1997, shall continue in full force and effect for the unexpired term and may be renewed by filing an application for renewal with the Secretary of State complying with the requirements of the Secretary of State and paying the renewal fee within six (6) months prior to the expiration of the registration.

(c) All applications for renewal under this subchapter, whether of registrations made under this subchapter or of registrations effected under any prior act, shall include a verified statement that the mark has been and is still in use and include a specimen showing actual use of the mark on or in connection with the goods or services.

**History.** Acts 1997, No. 1109, § 6.

#### **4-71-207. Assignments, changes of name, and other instruments.**

(a)(1) Any mark and its registration under this subchapter shall be assignable with the goodwill of the business in which the mark is used, or with that part of the goodwill of the business connected with the use of and symbolized by the mark.

(2) Assignment shall be by instruments in writing duly executed and shall be recorded with the Secretary of State upon the payment of the recording fee payable to the Secretary of State, who, upon recording of the assignment, shall issue in the name of the assignee a new certificate for the remainder of the term of the registration or of the last renewal thereof.

(3) An assignment of any registration under this subchapter shall be void as against any subsequent purchaser for valuable consideration without notice, unless it is recorded with the Secretary of State within three (3) months after the date thereof or prior to such subsequent purchase.

(b)(1) Any registrant or applicant effecting a change of the name of the person to whom the mark was issued or for whom an application was filed may record a certificate of change of name of the registrant or applicant with the Secretary of State upon payment of the recording fee.

(2)(A) The Secretary of State may issue in the name of the assignee a certificate of registration of an assigned application.

(B) The Secretary of State may issue in the name of the assignee a new certificate or registration for the remainder of the term of the registration or last renewal thereof.

(c) Other instruments which relate to a mark registered or application pending pursuant to this subchapter such as, by way of example, licenses, security interests, or mortgages, may be recorded in the

discretion of the Secretary of State provided that such instrument is in writing and duly executed.

(d) Acknowledgement shall be prima facie evidence of the execution of an assignment or other instrument and, when recorded by the Secretary of State, the record shall be prima facie evidence of execution.

(e) A photocopy of any instrument referred to in subsections (a), (b), or (c) of this section shall be accepted for recording if it is certified by any of the parties thereto, or their successors, to be a true and correct copy of the original.

**History.** Acts 1997, No. 1109, § 7.

#### **4-71-208. Records.**

The Secretary of State shall keep for public examination a record of all marks registered or renewed under this subchapter, as well as a record of all documents recorded pursuant to § 4-71-207.

**History.** Acts 1997, No. 1109, § 8.

#### **4-71-209. Cancellation.**

The Secretary of State shall cancel from the register, in whole or in part:

(1) Any registration concerning which the Secretary of State shall receive a voluntary request for cancellation from the registrant or the assignee of record;

(2) All registrations granted under this subchapter and not renewed in accordance with the provisions of this subchapter;

(3) Any registration concerning which a court of competent jurisdiction shall find that:

- (A) The registered mark has been abandoned;
- (B) The registrant is not the owner of the mark;
- (C) The registration was granted improperly;
- (D) The registration was obtained fraudulently;
- (E) The mark is or has become the generic name for the goods or services, or a portion thereof, for which it has been registered; or

(F)(i) The registered mark is so similar to a mark registered by another person in the United States Patent and Trademark Office prior to the date of the filing of the application for registration by the registrant under this subchapter, and not abandoned, as to be likely to cause confusion or mistake or to deceive.

(ii) Provided, however, that should the registrant prove that the registrant is the owner of a concurrent registration of a mark in the United States Patent and Trademark Office covering an area including this state, the registration under this subchapter shall not be cancelled for that area of the state; or

(4) Any registration that a court of competent jurisdiction shall order cancelled on any ground.

**History.** Acts 1997, No. 1109, § 9.

#### RESEARCH REFERENCES

**ALR.** Reverse confusion doctrine under state trademark law. 114 A.L.R.5th 129.

#### **4-71-210. Classification.**

(a) The Secretary of State shall by regulation establish a classification of goods and services for convenience of administration of this subchapter, but not to limit or extend the applicant's or registrant's rights, and a single application for registration of a mark may include any or all goods upon which, or services with which, the mark is actually being used indicating the appropriate class or classes of goods or services.

(b) When a single application includes goods or services which fall within multiple classes, the Secretary of State may require payment of a fee for each class.

(c) To the extent practical, the classification of goods and services should conform to the classification adopted by the United States Patent and Trademark Office.

**History.** Acts 1997, No. 1109, § 10.

#### **4-71-211. Fraudulent registration.**

Any person who shall for himself or herself, or on behalf of any other person, procure the filing or registration of any mark in the office of the Secretary of State under the provisions of this subchapter by knowingly making any false or fraudulent representation or declaration orally or in writing or by any other fraudulent means shall be liable to pay all damages sustained in consequence of such filing or registration to be recovered by or on behalf of the party injured thereby in any court of competent jurisdiction.

**History.** Acts 1997, No. 1109, § 11.

#### RESEARCH REFERENCES

**ALR.** Reverse confusion doctrine under state trademark law. 114 A.L.R.5th 129.

#### **4-71-212. Infringement.**

Subject to the provisions of § 4-71-216, any person who shall commit the following acts shall be liable in a civil action by the registrant for any and all of the remedies provided in § 4-71-214, except that under this section the registrant shall not be entitled to recover profits or damages unless the acts have been committed with the intent to cause confusion or mistake or to deceive:

(1) To use, without the consent of the registrant, any reproduction, counterfeit, copy, or colorable imitation of a mark registered under this subchapter in connection with the sale, distribution, offering for sale, or advertising of any goods or services on or in connection with which such use is likely to cause confusion or mistake or to deceive as to the source of origin of such goods or services; or

(2) To reproduce, counterfeit, copy, or colorably imitate any such mark and apply such reproduction, counterfeit, copy, or colorable imitation to labels, signs, prints, packages, wrappers, receptacles, or advertisements intended to be used upon or in connection with the sale or other distribution in this state of such goods or services.

**History.** Acts 1997, No. 1109, § 12.

### RESEARCH REFERENCES

**ALR.** World wide web domain as violating state trademark protection statute or state unfair trade practices act. 96

A.L.R.5th 1.

Reverse confusion doctrine under state trademark law. 114 A.L.R.5th 129.

### CASE NOTES

#### ANALYSIS

Descriptive Marks.  
Dominant Feature.  
Evidence.  
Injunctions.

#### **Descriptive Marks.**

Even though protection under this section did not apply to descriptive marks, and the name for which defendant had obtained certificates from the Arkansas Secretary of State were for a descriptive mark, the district court would not address whether or not the mark was protectible under state law because plaintiff had not asked the district court to cancel the state trademark registrations, nor had it engaged in the proper procedures for mounting a challenge to the registrations under state law. Ark. Trophy Hunters Ass'n v. Tex. Trophy Hunters Ass'n, 506 F. Supp. 2d 277 (W.D. Ark. 2007).

#### **Dominant Feature.**

To constitute infringement under former § 4-71-112, it is not necessary that the defendants appropriate the whole of plaintiff's mark; imitation need only be slight if it attaches to the salient features of the plaintiff's mark. Gaston's White River Resort v. Rush, 701 F. Supp. 1431 (W.D. Ark. 1988) (decision under prior law).

Although the court must consider the design as a unit, the court may analyze each feature to determine its significance to the unit as a whole and to ascertain the dominant feature of the mark. There is no flat rule as to what will prove to be the dominant feature of a composite design; however, the dominant feature is that which is most noticeable and most unavoidably attracts the attention of the public. Gaston's White River Resort v. Rush, 701 F. Supp. 1431 (W.D. Ark. 1988) (decision under prior law).

#### **Evidence.**

Cause sounding in Arkansas trademark infringement must meet the test required by the federal Lanham Trade-Mark Act provisions for unfair competition and trademark infringement. In order to establish its claim that the defendant has competed unfairly and infringed its rights in the design mark, plaintiff must show that: (1) it owns the design mark and has used the mark in a trademark sense, (2) the design was used without its consent, and (3) such use is likely to cause confusion. Gaston's White River Resort v. Rush, 701 F. Supp. 1431 (W.D. Ark. 1988) (decision under prior law).

Defendant's trademark infringement counterclaim under this section was dismissed with prejudice because even

though the Arkansas Secretary of State had granted it trademark certificates, allowing it to use a name that was the same name that plaintiff, an informal hunting club, used, defendant did not provide any evidence showing that plaintiff planned to use the name in competing trade shows or magazines or that plaintiff had any intent to cause consumer confusion, mistake, or deception. *Ark. Trophy Hunters Ass'n v. Tex. Trophy Hunters Ass'n*, 506 F. Supp. 2d 277 (W.D. Ark. 2007).

### **Injunctions.**

A nonprofit Arkansas corporation had superior common law rights in its six

county region and was a state-registered user of a service mark and, therefore, was entitled to an injunction against infringement of its service mark by a national association within such region; however, the nonprofit Arkansas corporation was not entitled to a statewide injunction because it presented no evidence of concrete plans to expand elsewhere in the state and there was no evidence to support the possibility of donor confusion. *Nat'l Ass'n for Healthcare Communs. v. Cent. Ark. Area Agency on Aging, Inc.*, 257 F.3d 732 (8th Cir. 2001).

## **4-71-213. Injury to business reputation — Dilution.**

(a)(1) The owner of a mark which is famous in this state shall be entitled, subject to the principles of equity and upon such terms as the court deems reasonable, to an injunction against another person's commercial use of a mark or trade name if such use begins after the mark has become famous and causes dilution of the distinctive quality of the mark, and to obtain such other relief as is provided in this section.

(2) In determining whether a mark is distinctive and famous, a court may consider factors such as, but not limited to:

(A) The degree of inherent or acquired distinctiveness of the mark in this state;

(B) The duration and extent of use of the mark in connection with the goods and services with which the mark is used;

(C) The duration and extent of advertising and publicity of the mark in this state;

(D) The geographical extent of the trading area in which the mark is used;

(E) The channels of trade for the goods or services with which the mark is used;

(F) The degree of recognition of the mark in the trading areas and channels of trade in this state used by the mark's owner and the person against whom the injunction is sought;

(G) The nature and extent of use of the same or similar mark by third parties; and

(H) Whether the mark is the subject of a state registration in this state, or a federal registration under the act of March 3, 1881, or under the act of February 20, 1905, or on the principal register.

(b)(1) In an action brought under this section, the owner of a famous mark shall be entitled only to injunctive relief in this state, unless the person against whom the injunctive relief is sought willfully intended to trade on the owner's reputation or to cause dilution of the famous mark.

(2) If such willful intent is proven, the owner shall also be entitled to the remedies set forth in this subchapter, subject to the discretion of the court and the principles of equity.

(c) The following shall not be actionable under this section:

(1) Fair use of a famous mark by another person in comparative commercial advertising or promotion to identify the competing goods or services of the owner of the famous mark;

(2) Noncommercial use of the mark; and

(3) All forms of news reporting and news commentary.

**History.** Acts 1997, No. 1109, § 13.

**Publisher's Notes.** The phrase "under the act of March 3, 1881, or under the act of February 20, 1905" may possibly be interpreted to mean "in the Patent Office."

**U.S. Code.** The act of March 3, 1881, and the act of February 20, 1905 were

repealed by the Trademark Act of 1946, insofar as they were inconsistent with that act. The act of February 20, 1905 was formerly codified as 15 U.S.C. § 81 et seq. The Trademark Act of 1946, also known as the Lanham Act, is codified as 15 U.S.C. § 1051 et seq.

### CASE NOTES

#### Dismissal of Claim.

Defendant's dilution of trademark counterclaim under this section, arising out of the fact that it and plaintiff used the same trophy hunters association name, was dismissed with prejudice because the name was merely descriptive, it had not acquired a secondary meaning, and it was

not a "famous" mark. The name was used only in a very narrow channel of trade, or niche market, and it did not have such powerful consumer associations that even non-competing uses could impinge on its value. *Ark. Trophy Hunters Ass'n v. Tex. Trophy Hunters Ass'n*, 506 F. Supp. 2d 277 (W.D. Ark. 2007).

#### 4-71-214. Remedies.

(a)(1)(A) Any owner of a mark registered under this subchapter may proceed by suit to enjoin the manufacture, use, display, or sale of any counterfeits or imitations of that mark and any court of competent jurisdiction may grant injunctions to restrain any manufacture, use, display, or sale as may be by the court deemed just and reasonable, and may require the defendants to pay to the owner all profits derived from or all damages suffered by reason of, or both, such wrongful manufacture, use, display, or sale.

(B) The court may also order that any such counterfeits or imitations in the possession or under the control of any defendant in such case be delivered to an officer of the court or to the complainant to be destroyed.

(2) The court, in its discretion, may enter judgment for an amount not to exceed three (3) times such profits and damages or reasonable attorney's fees of the prevailing party, or both, in cases where the court finds the other party committed wrongful acts with knowledge or in bad faith or otherwise as according to the circumstances of the case.

(b) The enumeration of any right or remedy in this section shall not affect a registrant's right to prosecute under any penal law of this state.

**History.** Acts 1997, No. 1109, § 14.

## CASE NOTES

## ANALYSIS

Applicability.  
Authority of Court.  
Injunction Denied.  
Trade Names.

**Applicability.**

The clear meaning of former § 4-71-113 comprehended cases in which the parties directly compete; such a meaning is logically inferred from the use of the word "notwithstanding." This section applies obviously to competitors who directly compete and also to those who do not compete directly. *Gaston's White River Resort v. Rush*, 701 F. Supp. 1431 (W.D. Ark. 1988) (decided under prior law).

Former § 4-71-113 recognized the value of a trade name in its own right and affords protection to the owner against its unauthorized use, and neither competition nor confusion on the part of customers is required; the issue is not one of competition, but of the likelihood of dilution of the value of the trade name as an asset by its use by someone other than the owner. *Williams v. Spelic*, 311 Ark. 279, 844 S.W.2d 305 (1992) (decision under prior law).

Other states' anti-dilution laws, nearly identical to this section, have been held to be enforceable nationwide against defendants over whom a court has jurisdiction. *Champions Golf Club, Inc. v. Sunrise Land Corp.*, 846 F. Supp. 742 (W.D. Ark. 1994) (decision under prior law).

There was no basis for contending that former § 4-71-113 required a showing that the mark in question was registered under this chapter. *Champions Golf Club, Inc. v. Sunrise Land Corp.*, 846 F. Supp. 742 (W.D. Ark. 1994).

**Authority of Court.**

Where the wrongful use of a trade name has begun to eat away at and dilute and weaken the value of plaintiff's name, the federal court has the power and the duty, using its equity powers, to prevent and terminate such irreparable harm; even if the court did not have such inherent power, it believes that the provisions of this section gives it such power. *Champions Golf Club, Inc. v. Sunrise Land Corp.*, 846 F. Supp. 742 (W.D. Ark. 1994) (decision under prior law).

**Injunction Denied.**

Broad injunctive relief sought by manufacturer and distributor of hair care products not granted where there was no evidence of poor results or injuries arising from consumers' uncounseled use of products purchased in retail outlet and there was no indication of lost sales or other economic damage; even if court assumed that some salons would stop selling hair care products if they were available in retail stores, there was no basis for concluding that these lost sales would be greater than the increased revenue resulting from the availability of the product in ordinary retail outlets. *Graham Webb Int'l Ltd. Partnership v. Emporium Drug Mart, Inc.*, 916 F. Supp. 909 (E.D. Ark. 1995) (decision under prior law).

**Trade Names.**

The words "shear pleasure" used in the names of two hair care businesses had not acquired a secondary meaning and did not constitute a valid trade name subject to injunctive protection under former § 4-71-113. *Pullan v. Fulbright*, 287 Ark. 21, 695 S.W.2d 830 (1985) (decision under prior law).

Where purchaser of business also purchased the trade name containing seller's maiden name, the purchaser acquired a valuable property right to inform the public that it possessed the experience and skill symbolized by the original concern, and an injunction against the use of the maiden name by the sellers could validly be issued. *Williams v. Spelic*, 311 Ark. 279, 844 S.W.2d 305 (1992) (decision under prior law).

Where a name had been an accepted and acknowledged local synonym for a particular business, and, as such, the name had a special significance and meaning, that the continued use of the name in sellers' subsequent business could only result in hopeless confusion for the general public. *Williams v. Spelic*, 311 Ark. 279, 844 S.W.2d 305 (1992) (decision under prior law).

Tri-County Funeral Service, Inc., which does business as "Howard Funeral Home" in Melbourne, successfully enjoined Eddie Howard Funeral Home, Inc., also located in Melbourne, from using the name "Howard" in connection with its funeral busi-

ness. *Tri-County Funeral Serv., Inc. v. Eddie Howard Funeral Home*, 330 Ark. 789, 957 S.W.2d 694 (1997) (decision under prior law).

#### **4-71-215. Forum for actions regarding registration — Service on out-of-state registrants.**

(a)(1) Actions to require cancellation of a mark registered pursuant to this subchapter or in mandamus to compel registration of a mark pursuant to this subchapter shall be brought in the circuit court.

(2)(A) In an action in mandamus, the proceeding shall be based solely upon the record before the Secretary of State.

(B) In an action for cancellation, the Secretary of State shall not be made a party to the proceeding but shall be notified of the filing of the complaint by the clerk of the court in which it is filed and shall be given the right to intervene in the action.

(b) In any action brought against a nonresident registrant, service may be effected upon the Secretary of State as agent for service of the registrant in accordance with the procedures established for service upon nonresident corporations and business entities under §§ 16-58-126 and 16-58-127.

**History.** Acts 1997, No. 1109, § 15.

**Cross References.** Jurisdiction of cir-

cuit courts, Ark. Const. Amend. 80, §§ 6, 19.

#### **4-71-216. Common law rights.**

Nothing in this subchapter shall adversely affect the rights or the enforcement of rights in marks acquired in good faith at any time at common law.

**History.** Acts 1997, No. 1109, § 16.

#### **4-71-217. Fees.**

(a) The Secretary of State shall by regulation prescribe the fees payable for the various applications and recording fees and for related services.

(b) Unless specified by the Secretary of State, the fees payable in this subchapter are not refundable.

**History.** Acts 1997, No. 1109, § 17.

#### **4-71-218. Repeal of prior acts — Intent of subchapter.**

(a)(1) This subchapter shall not affect any suit, proceeding, or appeal pending prior to August 1, 1997.

(2)(A) All acts relating to marks and parts of any other acts inconsistent herewith are hereby repealed on August 1, 1997.

(B) Provided, that as to any application, suit, proceeding, or appeal pending at the time this subchapter takes effect, and for that purpose only, such repeal shall be deemed not to be effective until final

determination of said pending application, suit, proceeding, or appeal.

(b)(1) The intent of this subchapter is to provide a system of state trademark registration and protection substantially consistent with the federal system of trademark registration and protection under the Trademark Act of 1946, as amended.

(2) To that end, the construction given the federal act should be examined as persuasive authority for interpreting and construing this subchapter.

**History.** Acts 1997, No. 1109, § 20. referred to in this section, is primarily  
**U.S. Code.** The Trademark Act of 1946, codified as 15 U.S.C. § 1051 et seq.

## CHAPTER 72

### FRANCHISES

SUBCHAPTER.

1. GENERAL PROVISIONS. [RESERVED.]
2. ARKANSAS FRANCHISE PRACTICES ACT.
3. FARM EQUIPMENT RETAILER FRANCHISE PROTECTION.
4. PETROLEUM PRODUCTS SUPPLIERS AND DISTRIBUTORS.
5. PETROLEUM PRODUCTS SUPPLIERS, DEALERS, AND DISTRIBUTORS.
6. PROCEDURAL FAIRNESS FOR RESTAURANT FRANCHISEES.

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### RESEARCH REFERENCES

**Am. Jur.** 36 Am. Jur. 2d, Franch., § 1 **C.J.S.** 37 C.J.S., Franch., § 2 et seq.  
et seq.

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### SUBCHAPTER 1 — GENERAL PROVISIONS

[Reserved]

### SUBCHAPTER 2 — ARKANSAS FRANCHISE PRACTICES ACT

SECTION.

- 4-72-201. Title.  
4-72-202. Definitions.  
4-72-203. Applicability of subchapter.  
4-72-204. Termination, cancellation, or failure to renew.  
4-72-205. Transfer, assignment, or sale of franchise.  
4-72-206. Unlawful practices of franchisors.

SECTION.

- 4-72-207. Misleading and fraudulent schemes — Penalty — Prosecutions.  
4-72-208. Franchisee's remedies.  
4-72-209. Franchisee's right of repurchase.  
4-72-210. Immunity granted those furnishing information.

**Effective Dates.** Acts 1977, No. 355, § 13: Mar. 4, 1977. Emergency clause provided: "The Legislature finds and declares that distribution and sale of franchise agreements in the State of Arkansas vitally affects the general economy of the State, public interest and public welfare; that franchisors as described in this Act, for adequate fees have licensed Arkansas corporations and citizens to use the trade names and formulas; and that in some instances, franchisors collect advertising fees from franchisees which are not expended for advertising purposes; and that some franchisors have, without good cause and to the great prejudice and harm of the citizens of the State of Arkansas, cancelled existing franchise agreements and that other such cancellations are threatened; and that only by the immediate passage of this Act can this situation be remedied and it is therefore necessary in the public interest to define the relationship and responsibilities of franchisors and franchisees in connection with franchise agreements. Therefore, an

emergency is declared to exist and this Act being necessary for the preservation of public peace, health and safety, shall be in full force and effect from and after its passage and approval."

Acts 1979, No. 424, § 3: Mar. 20, 1979. Emergency clause provided: "It is hereby found and determined by the Seventy-Second General Assembly of the State of Arkansas that the definition of franchise contained in the Arkansas Franchise Practices Act is in need of immediate clarification to clearly indicate that a franchise is not created by a lease, license or concession granted by a retailer to sell goods or furnish services on or from the premises occupied by the retailer primarily for its own merchandising activities, and that this Act is immediately necessary to accomplish such clarification. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

## RESEARCH REFERENCES

**ALR.** Interference with franchise. 6 A.L.R.4th 195.

Primary liability of private chain franchisor for injury or death caused by franchised premises or equipment, 59 A.L.R.4th 1142.

Wrongful termination of franchise other than automobile dealership contracts, 40

A.L.R.5th 57.

Existence of fiduciary duty between franchisor and franchisee, 52 A.L.R.5th 613.

**U. Ark. Little Rock L.J.** Survey of Arkansas Law, Business Law, 1 U. Ark. Little Rock L.J. 118.

## CASE NOTES

### ANALYSIS

Applicability.  
Choice of Law.  
Franchises.

#### Applicability.

This subchapter only applies if the franchisee is required to do business in Arkansas. *JRT Inc. v. TCBY Sys.*, 52 F.3d 734 (8th Cir. 1995).

#### Choice of Law.

The parties' limited choice of Texas law had no impact on the determination of whether the plaintiff could claim protection under the act where the parties' agreement stated in relevant part, "This

Agreement is executed in duplicate on the above date and the laws of the State of Texas shall govern its interpretation;" such language was in sharp contrast with the more broad choice of law clauses scattered throughout the cases, providing that the law of a particular state would "govern the contract." *Heating & Air Specialists, Inc. v. Jones*, 180 F.3d 923 (8th Cir. 1999).

The substantive laws of Arkansas generally governed the parties' rights and responsibilities under their agreements and the act applied to those agreements, notwithstanding that the agreements by their express terms did not become effective until signed by the defendant in Texas, the plaintiff communicated by mail

or telephone with the defendant's office in Texas periodically throughout their relationship, and the plaintiff performed its part of the agreement by mailing payments to the defendant's Texas address; the plaintiff had executed the agreements in Arkansas, the defendant shipped its goods to the plaintiff in Arkansas, the agreements themselves indicated that the franchise at issue would operate in Arkansas, the plaintiff's right to advertise and sell the defendant's products under the agreements was geographically restricted to Arkansas, the defendant actively sought the plaintiff's participation in the

franchise by sending its representatives to Arkansas, and the bulk of the parties' negotiations took place in Arkansas. *Heating & Air Specialists, Inc. v. Jones*, 180 F.3d 923 (8th Cir. 1999).

#### **Franchises.**

A contractual provision that clearly and explicitly provided that the arrangement between the parties would be that of a nonexclusive distributor did not create a franchisor-franchisee relationship between the parties covered by the Arkansas Franchise Practices Act. *Consolidated Naturals, Inc. v. Wm. T. Thompson Co.*, 623 F. Supp. 458 (W.D. Ark. 1985).

### **4-72-201. Title.**

This subchapter shall be known and may be cited as the "Arkansas Franchise Practices Act".

**History.** Acts 1977, No. 355, § 1; A.S.A. 1947, § 70-807.

### **RESEARCH REFERENCES**

**Ark. L. Rev.** Recent Developments: Act - Special Order Products, 59 Ark. L. Robinson-Patman Price Discrimination Rev. 199.

### **CASE NOTES**

#### **ANALYSIS**

Applicability.  
Arbitration.

#### **Applicability.**

Where a truck dealer and franchisee asserted that a truck manufacturer and franchisor granted greater price concessions to the dealer's competitors, the dealer was not limited to the remedies provided by the Arkansas Motor Vehicle Commission Act, § 23-112-101 et seq., and could pursue remedies under the Arkansas Franchise Practices Act, § 4-72-201 et seq. *Reeder-Simco GMC, Inc. v. Volvo GM Heavy Truck Corp.*, 374 F.3d 701 (8th Cir. 2004), rehearing denied, — F.3d —, 2004 U.S. App. LEXIS 20914 (8th Cir. Oct. 6, 2004), rev'd, *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 126 S. Ct. 860, 163 L. Ed. 2d 663 (2006).

#### **Arbitration.**

Parties' arbitration agreement did not limit or waive any substantive rights a distributor had under the Arkansas Franchise Practices Act, should it be found to apply. Instead, the claims under the Act could be resolved in the arbitral forum, as well as any other issues and claims raised by the distributor. *Gruma Corp. v. Morrison*, 2010 Ark. 151, — S.W.3d — (2010).

**Cited:** *Kent Jenkins Sales, Inc. v. Angelo Bros. Co.*, 804 F.2d 482 (8th Cir. 1986); *Morgan Distrib. Co. v. Unidynamic Corp.*, 868 F.2d 992 (8th Cir. 1989); *Chrysler Motors Corp. v. Thomas Auto Co.*, 939 F.2d 538 (8th Cir. 1991); *Dr. Pepper Bottling Co. v. Frantz*, 311 Ark. 136, 842 S.W.2d 37 (1992); *Arkcom Digital Corp. v. Xerox Corp.*, 289 F.3d 536 (8th Cir. 2002).

**4-72-202. Definitions.**

As used in this subchapter, unless the context otherwise requires:

(1)(A) "Franchise" means a written or oral agreement for a definite or indefinite period in which a person grants to another person a license to use a trade name, trademark, service mark, or related characteristic within an exclusive or nonexclusive territory or to sell or distribute goods or services within an exclusive or nonexclusive territory at wholesale or retail, by lease agreement, or otherwise.

(B) However, a franchise is not created by a lease, license, or concession granted by a retailer to sell goods or furnish services on or from premises which are occupied by the retailer-grantor primarily for its own merchandising activities and a franchise is not created by door-to-door sales complying with § 4-89-101 et seq.;

(2) "Person" means a natural person, corporation, partnership, trust, or other entity, and, in case of an entity, "person" shall include any other entity which has a majority interest in such entity or effectively controls such other entity as well as the individual officers, directors, and other persons in active control of the activities of each entity;

(3) "Franchisor" means a person who grants a franchise to another person;

(4) "Franchisee" means a person to whom a franchise is offered or granted;

(5) "Sale, transfer, or assignment" means any disposition of a franchise or any interest therein, with or without consideration, to include, but not be limited to, a bequest, inheritance, gift, exchange, lease, or license;

(6) "Place of business" means a fixed geographical location at which the franchisee displays for sale and sells the franchisor's goods or offers for sale and sells the franchisor's services;

(7) "Good cause" means:

(A) Failure by a franchisee to comply substantially with the requirements imposed upon him or her by the franchisor, or sought to be imposed by the franchisor, which requirements are not discriminatory as compared with the requirements imposed on other similarly situated franchisees, either by their terms or in the manner of their enforcement; or

(B) The failure by the franchisee to act in good faith and in a commercially reasonable manner in carrying out the terms of the franchise; or

(C) Voluntary abandonment of the franchise; or

(D) Conviction of the franchisee in a court of competent jurisdiction of an offense, punishable by a term of imprisonment in excess of one (1) year, substantially related to the business conducted pursuant to the franchise; or

(E) Any act by a franchisee which substantially impairs the franchisor's trademark or trade name; or

(F) The institution of insolvency or bankruptcy proceedings by or against a franchisee, or any assignment or attempted assignment by

a franchisee of the franchise or the assets of the franchise for the benefit of the creditors; or

(G) Loss of the franchisor's or franchisee's right to occupy the premises from which the franchise business is operated; or

(H) Failure of the franchisee to pay to the franchisor within ten (10) days after receipt of notice of any sums past due the franchisor and relating to the franchise; and

(8) "Good faith" means honesty in fact in the conduct or transaction concerned.

**History.** Acts 1977, No. 355, § 2; 1979, No. 424, § 1; A.S.A. 1947, § 70-808; Acts 1991, No. 411, § 5; 1991, No. 760, § 1; 1997, No. 1128, § 1.

**Publisher's Notes.** The provisions of subdivision (7)(F) of this section may be in conflict with the federal bankruptcy laws.

## CASE NOTES

### ANALYSIS

Good Cause.

Franchise.

Place of Business.

#### Good Cause.

The defendant had good cause to cancel the plaintiff's franchise where the uncontroverted evidence adduced at trial showed that, on the date of the termination notice, the plaintiff's account was past due, and where the plaintiff further admitted that it did not repay any part of the amount owed within the ten-day grace period provided by the defendant. *Heating & Air Specialists, Inc. v. Jones*, 180 F.3d 923 (8th Cir. 1999).

Enumerated occurrences in the statute are the exclusive means by which a franchisor can terminate a franchise for "good cause." *Larry Hobbs Farm Equip., Inc. v. CNH Am., LLC*, 375 Ark. 379, 291 S.W.3d 190 (2009).

Franchisee was entitled to relief in its action against a franchisor for violation of the Arkansas Franchise Practices Act because under subdivision (7) of this section, neither the market withdrawal of a product nor the withdrawal of a trademark or trade name for a product constituted "good cause" to terminate a franchise. *Larry Hobbs Farm Equip., Inc. v. CNH Am., LLC*, 375 Ark. 379, 291 S.W.3d 190 (2009).

#### Franchise.

Where the manufacturer's representative did not take title and possession of

any of the manufacturer's products, and although the representative had some authority to negotiate price, he did not have an unqualified authorization to transfer the product at the point and moment of the agreement to sell, the representative was a promoter or solicitor of sales rather than an actual seller of goods; therefore, he did not have a cause of action based on the Franchise Practices Act. *Kent Jenkins Sales, Inc. v. Angelo Bros. Co.*, 804 F.2d 482 (8th Cir. 1986).

The business relationship created by the contract between the parties was not a franchise where the plaintiff maintained no inventory, had no authority to set prices, and could not enter into a binding contract of insurance, and where his authority went no further than to solicit and procure applications for insurance. *Stockton v. Sentry Ins.*, 337 Ark. 507, 989 S.W.2d 914 (1999).

Trial court properly determined that an insurance agent was not a franchisee under the Arkansas Franchise Practices Act, subdivision (1)(A) of this section, because the agent did not have the unqualified authority to sell policies or commit the insurance company to an insurance contract other than a temporary binder, which, by definition, could have been cancelled at any time at the discretion of the company. *Gunn v. Farmers Ins. Exch.*, 2010 Ark. 434, — S.W.3d — (2010).

#### Place of Business.

A multi-county sales area was not a place of business at a fixed geographical location. *Bridgman v. Cornwell Quality Tools Co.*, 831 F.2d 174 (8th Cir. 1987).

The Franchise Practices Act did not apply to an agreement between the parties whereby the plaintiff became an independent distributor for the defendant since no fixed geographical location for selling products or services was ever contemplated, much less required, by the parties' agreement. *Mary Kay, Inc. v. Isbell*, 338 Ark. 556, 999 S.W.2d 669 (1999), appeal dismissed, *Isbell v. Mary Kay Cosmetics*, 338 Ark. 580, 999 S.W.2d 673 (Ark. 1999).

Arkansas Franchise Practices Act, § 4-72-201 et seq., applied to protect a beverage distributor from the wrongful termination of its agreement by the manufacturer since the parties clearly contemplated that there would be a "place

of business" in Arkansas and the distributor's planned satellite warehouse would have qualified as one under subdivision (6) as it would have had a telephone, forklift, the beverages for distribution, and personnel to run operations; further, the distributor already had an outlet for the beverages in Arkansas with a different beverage manufacturer. *S. Beach Bev. Co. v. Harris Brands, Inc.*, 355 Ark. 347, 138 S.W.3d 102 (2003).

**Cited:** *Chrysler Motors Corp. v. Thomas Auto Co.*, 939 F.2d 538 (8th Cir. 1991); *Fisher v. Jones*, 306 Ark. 577, 816 S.W.2d 865 (1991); *Dr. Pepper Bottling Co. v. Frantz*, 311 Ark. 136, 842 S.W.2d 37 (1992).

#### 4-72-203. Applicability of subchapter.

This subchapter applies only to a franchise entered into, renewed, or transferred after March 4, 1977, the performance of which contemplates or requires the franchise to establish or maintain a place of business within the State of Arkansas. However, the provisions of this subchapter shall not apply to those business relations, actions, transactions, or franchises subject to the provisions of § 4-72-401 et seq. and § 4-72-501 et seq., or which are subject to the Federal Trade Commission regulations, "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures", 16 C.F.R. 436.1 et seq.

**History.** Acts 1977, No. 355, § 3; A.S.A. 1947, § 70-809; Acts 1991, No. 760, § 2.

#### CASE NOTES

##### Illustrative Cases.

Where the manufacturer's representative did not take title and possession of any of the manufacturer's products, and although the representative had some authority to negotiate price, he did not have an unqualified authorization to transfer the product at the point and moment of the agreement to sell, the representative was a promoter or solicitor of sales rather than an actual seller of goods; therefore, he did not have a cause of action based on the Franchise Practices Act. *Kent Jenkins Sales, Inc. v. Angelo Bros. Co.*, 804 F.2d 482 (8th Cir. 1986).

Where franchise agreements entered into Arkansas contemplated yogurt stores in Michigan only, this subchapter did not

apply. *JRT Inc. v. TCBY Sys.*, 52 F.3d 734 (8th Cir. 1995).

The Franchise Practices Act did not apply to an agreement between the parties whereby the plaintiff became an independent distributor for the defendant since no fixed geographical location for selling products or services was ever contemplated, much less required, by the parties' agreement. *Mary Kay, Inc. v. Isbell*, 338 Ark. 556, 999 S.W.2d 669 (1999), appeal dismissed, *Isbell v. Mary Kay Cosmetics*, 338 Ark. 580, 999 S.W.2d 673 (Ark. 1999).

Restaurant owners' claim under the Arkansas Franchises Practices Act against restaurant chain was dismissed because the AFPA did not apply to fran-

chises subject to the Federal Trade Commission's regulations and it was clear that the franchises at issues were subject to those regulations; the franchise agreements were contracts in or affecting commerce, granted the owners the right to use trade names, trademarks, and service marks in exchange for a fee, gave the restaurant chain significant control over the owners' operations, including the right to inspect the franchised restau-

rants, and the owners were obligated to report financial results to the chain. *J.K.P. Foods, Inc. v. McDonald's Corp.*, 420 F. Supp. 2d 966 (E.D. Ark. 2006).

**Cited:** *Bridgman v. Cornwell Quality Tools Co.*, 831 F.2d 174 (8th Cir. 1987); *Dr. Pepper Bottling Co. v. Frantz*, 311 Ark. 136, 842 S.W.2d 37 (1992); *Reeder-Simco GMC, Inc. v. Volvo GM Heavy Truck Corp.*, 374 F.3d 701 (8th Cir. 2004).

#### **4-72-204. Termination, cancellation, or failure to renew.**

(a) It shall be a violation of this subchapter for a franchisor to:

(1) Terminate or cancel a franchise without good cause; or

(2) Fail to renew a franchise except for good cause or except in accordance with the current policies, practices, and standards established by the franchisor which in their establishment, operation, or application are not arbitrary or capricious.

(b) No franchisor shall directly or indirectly terminate, cancel, or fail to renew a franchise without first giving written notice to the franchisee at least ninety (90) days in advance of such action, setting forth the reasons for the termination, cancellation, or intention not to renew, and, in the case of terminations, shall provide the franchisee with thirty (30) days in which to rectify any claimed deficiency.

(c) The notice provisions of this section shall not apply where the reason for termination or cancellation is good cause under § 4-72-202(7)(C)-(H).

(d) If the reason for termination, cancellation, or failure to renew is for repeated deficiencies within a twelve-month period giving rise to good cause under § 4-72-202 (7)(A) or (B), the franchisee shall have ten (10) days to rectify the repeated deficiencies and thereby void the notice.

**History.** Acts 1977, No. 355, §§ 4, 5; A.S.A. 1947, §§ 70-810, 70-811.

#### **CASE NOTES**

##### **ANALYSIS**

Constructive Termination.  
Good Cause.

##### **Constructive Termination.**

Summary judgment was inappropriate on claims brought under the Arkansas Franchise Practices Act, §§ 4-72-204(a)(1), 4-72-206(6), and 4-72-207(a)(3); significant issues remained as to the damages available to the franchisee and to the defenses the franchisor might be able to raise. *Capital Equip., Inc. v. CNH*

*America, LLC*, 471 F. Supp. 2d 951 (E.D. Ark. 2006).

##### **Good Cause.**

Where there was evidence from which the jury could readily have found that termination of distributorship was attributable to franchisor having acquired a competing bottling company, rather than from the actions of the franchisee, the issue was one for the jury. *Dr. Pepper Bottling Co. v. Frantz*, 311 Ark. 136, 842 S.W.2d 37 (1992).

Arkansas Franchise Practices Act, § 4-

72-201 et seq., applied to protect a beverage distributor from the wrongful termination of its agreement by the manufacturer since the parties clearly contemplated that there would be a "place of business" in Arkansas and the distributor's planned satellite warehouse would have qualified as one under § 4-72-202(6) as it would have had a telephone, forklift, the beverages for distribution, and personnel to run operations; further, the distributor already had an outlet for the beverages in Arkansas with a different beverage manufacturer. *S. Beach Bev. Co. v. Harris Brands, Inc.*, 355 Ark. 347, 138 S.W.3d 102 (2003).

Franchisee was entitled to relief in its action against a franchisor for violation of the Arkansas Franchise Practices Act because under subdivision (a)(1) of this section, neither the market withdrawal of a product nor the withdrawal of a trademark or trade name for a product constituted "good cause" to terminate a franchise. *Larry Hobbs Farm Equip., Inc. v. CNH Am., LLC*, 375 Ark. 379, 291 S.W.3d 190 (2009).

**Cited:** *Kent Jenkins Sales, Inc. v. Angelo Bros. Co.*, 804 F.2d 482 (8th Cir. 1986).

#### **4-72-205. Transfer, assignment, or sale of franchise.**

(a) It shall be a violation of this subchapter for any franchisee to transfer, assign, or sell a franchise or interest therein to another person unless the franchisee first notifies the franchisor of that intention by written notice, setting forth in the notice of intent the prospective transferee's name, address, statement of financial qualification, and business experience during the previous five (5) years.

(b)(1) The franchisor shall within sixty (60) days after receipt of the notice either approve in writing to the franchisee the sale to the proposed transferee or by written notice advise the franchisee of the unacceptability of the proposed transferee, setting forth a material reason relating to the character, financial ability, or business experience of the proposed transferee.

(2) If the franchisor does not reply within the specified sixty (60) days, his or her approval is deemed granted.

(c) No transfer, assignment, or sale pursuant to this section shall be valid unless the transferee agrees in writing to comply with all of the requirements of the franchise then in effect.

**History.** Acts 1977, No. 355, § 6; A.S.A. 1947, § 70-812.

#### **4-72-206. Unlawful practices of franchisors.**

It shall be a violation of this subchapter for any franchisor, through any officer, agent, or employee to engage directly or indirectly in any of the following practices:

(1) To require a franchisee at the time of entering into a franchise arrangement to assent to a release, assignment, novation, waiver, or estoppel which would relieve any person from liability imposed by this subchapter;

(2) To prohibit directly or indirectly the right of free association among franchisees for any lawful purpose;

(3) To require or prohibit any change in management of any franchisee unless the requirement or prohibition of change shall be for

reasonable cause, which cause shall be stated in writing by the franchisor;

(4) To restrict the sale of any equity or debenture issue or the transfer of any security of a franchisee or in any way prevent or attempt to prevent the transfer, sale, or issuance of shares of stock or debentures to employees, personnel of the franchisee, or heirs of the principal owner as long as basic financial requirements of the franchisor are complied with, if the sale, transfer, or issuance does not have the effect of accomplishing a sale of the franchise;

(5) To provide any term or condition in any lease or other agreement ancillary or collateral to a franchise, which term or condition directly or indirectly violates this subchapter;

(6) To refuse to deal with a franchise in a commercially reasonable manner and in good faith; or

(7) To collect a percentage of the franchisee's sales as an advertising fee and not use these funds for the purpose of advertising the business conducted by the franchisee.

**History.** Acts 1977, No. 355, § 7; A.S.A. 1947, § 70-813.

## CASE NOTES

### ANALYSIS

Commercially Reasonable Manner.  
Duty of Franchisor.

#### **Commercially Reasonable Manner.**

Summary judgment was inappropriate on claims brought under the Arkansas Franchise Practices Act, §§ 4-72-204(a)(1), 4-72-206(6), and 4-72-207(a)(3); significant issues remained as to the damages available to the franchisee and to the defenses the franchisor might be able to raise. *Capital Equip., Inc. v. CNH America, LLC*, 471 F. Supp. 2d 951 (E.D. Ark. 2006).

Substantial evidence supported the jury's finding that the company refused to deal with its franchise with the distributor in a commercially reasonable manner and in good faith; there was evidence that witnesses knew of the company's plan to force the distributor out of business and that the sale of one franchise to another was executed in furtherance of the company's overall plan to eliminate the distributor as a distributor. *Miller Brewing Co. v. Ed Roleson, Jr., Inc.*, 365 Ark. 38, 223 S.W.3d 806 (2006).

Distributor presented proof demonstrating the existence of a material issue

of fact as to whether the brewing company's actions constituted a refusal to deal with a franchise in a commercially reasonable manner and in good faith; it was therefore entitled to submit this claim to a jury. *Southeastern Distrib. Co. v. Miller Brewing Co.*, 366 Ark. 560, 237 S.W.3d 63 (2006).

#### **Duty of Franchisor.**

Section 4-1-203 states that every contract imposes an obligation of good faith in the performance of the contract, and to establish a breach of that obligation, the plaintiff must demonstrate that the defendant was not honest in fact and that he acted with a bad motive; similarly, this section requires a franchisor to act in a commercially-reasonable manner and in good faith in its relationship with a franchisee. *Southern Implement Co. v. Deere & Co.*, 122 F.3d 503 (8th Cir. 1997).

Whether franchisor had an obligation, contractual or otherwise, to prevent an unauthorized competitor from operating a facility in plaintiff's franchise region, was a question of fact for the jury. *Southern Implement Co. v. Deere & Co.*, 122 F.3d 503 (8th Cir. 1997).

**Cited:** *Coast-to-Coast Stores, Inc. v. Womack-Bowers, Inc.*, 818 F.2d 1398 (8th

Cir. 1987); Reeder-Simco GMC, Inc. v. Volvo GM Heavy Truck Corp., 374 F.3d 701 (8th Cir. 2004).

#### **4-72-207. Misleading and fraudulent schemes — Penalty — Prosecutions.**

(a) It shall be unlawful for any person, directly or indirectly, in connection with the offer, sale, purchase, transfer, or assignment of any franchise in this state to knowingly:

- (1) Employ any device, scheme, or artifice to defraud;
- (2) Make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading; or
- (3) Engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

(b) Any violation of this section shall be a Class B felony.

(c) Prosecutions for offenses committed in violation of this section must be commenced within five (5) years from the date of the crime or within five (5) years from the date of the commission of the last overt act in furtherance of the scheme to defraud.

**History.** Acts 1977, No. 355, § 8; A.S.A. 1947, § 70-814.

**Cross References.** Class B felony, penalty, §§ 5-4-201, 5-4-401.

### **CASE NOTES**

#### **ANALYSIS**

False or Misleading Statements.  
Fraud.

#### **False or Misleading Statements.**

Where "questionnaire" given to prospective distributor by agent of franchisor stated that an exclusive territory would be violative of the Sherman Anti-Trust Act, that there might be other distributors selected or currently established in prospect's area and prospective distributor would be expected to develop sales beyond his immediate area, it could not be held that the agent had made untrue statements or misrepresentations under the Securities Act or the Franchise Practice Act, in order to induce prospect into entering into distributorship agreement. *Kern v. Sells Enters., Inc.*, 271 Ark. 904, 612 S.W.2d 94 (1981).

#### **Fraud.**

Projections related to franchise profits are not representations of pre-existing material fact, but are representations related to future events, and absent actual knowledge of falsity, do not constitute fraud. *Morrison v. Back Yard Burgers, Inc.*, 91 F.3d 1184 (8th Cir. 1996).

Summary judgment was inappropriate on claims brought under the Arkansas Franchise Practices Act, §§ 4-72-204(a)(1), 4-72-206(6), and 4-72-207(a)(3); significant issues remained as to the damages available to the franchisee and to the defenses the franchisor might be able to raise. *Capital Equip., Inc. v. CNH America, LLC*, 471 F. Supp. 2d 951 (E.D. Ark. 2006).

**Cited:** *Coast-to-Coast Stores, Inc. v. Womack-Bowers, Inc.*, 818 F.2d 1398 (8th Cir. 1987); *Arkcom Digital Corp. v. Xerox Corp.*, 289 F.3d 536 (8th Cir. 2002).

**4-72-208. Franchisee's remedies.**

(a) Any franchisee who is harmed by a violation or violations of § 4-72-207 shall be entitled to recover treble damages in a civil action and, where appropriate, obtain injunctive relief in addition to reasonable attorney's fees and costs of litigation.

(b) Any franchisee who is harmed by a violation of any other section of this subchapter shall be entitled to recover actual damages in a civil action and, where appropriate, obtain injunctive relief in addition to reasonable attorney's fees and costs of litigation.

(c) In addition to the other remedies provided for in this subchapter, the Attorney General shall have authority to file a petition in the circuit court of the county in which the State Capitol is located, seeking an injunction prohibiting any person, firm, corporation, partnership, or other entity from engaging in any of the practices prohibited by this subchapter. However, nothing shall prohibit the Securities Commissioner from taking appropriate action whenever a franchise constitutes a security under the Arkansas Securities Act, § 23-42-101 et seq.

**History.** Acts 1977, No. 355, §§ 10, 11; A.S.A. 1947, §§ 70-816, 70-817.

cuit courts, Ark. Const. Amend. 80 §§ 6, 19.

**Cross References.** Jurisdiction of cir-

**CASE NOTES****ANALYSIS**

In General.  
Attorney's Fees.

**In General.**

Distributor failed to present sufficient proof to demonstrate the existence of a material fact on the issue of fraud as, even if the Court accepted as true the distributor's allegation that an executive told another that the brewing company would not approve any prospective purchaser other than the one who bought the distributorship, this was not a false statement of act but, rather, a promise or prediction of future conduct. *Southeastern Distrib. Co. v. Miller Brewing Co.*, 366 Ark. 560, 237 S.W.3d 63 (2006).

**Attorney's Fees.**

In awarding attorney's fees to a franchisee for the franchisor's wrongful termination of the franchise agreement, the trial court erred by not applying the *Chrisco* factors in deciding what were reasonable attorney's fees. *S. Beach Bev. Co. v. Harris Brands, Inc.*, 355 Ark. 347, 138 S.W.3d 102 (2003).

**Cited:** *Kent Jenkins Sales, Inc. v. Angelo Bros. Co.*, 804 F.2d 482 (8th Cir. 1986); *Arkcom Digital Corp. v. Xerox Corp.*, 289 F.3d 536 (8th Cir. 2002); *Reeder-Simco GMC, Inc. v. Volvo GM Heavy Truck Corp.*, 374 F.3d 701 (8th Cir. 2004).

**4-72-209. Franchisee's right of repurchase.**

Upon termination of any franchise by a franchisor without good cause, the franchisor shall, at the franchisee's option, repurchase at franchisee's net cost, less a reasonable allowance for depreciation or obsolescence, the franchisee's inventory, supplies, equipment, and furnishings purchased by the franchisee from the franchisor or its approved sources; however, no compensation shall be allowed for the personalized items which have no value to the franchisor.

**History.** Acts 1977, No. 355, § 9; A.S.A. 1947, § 70-815.

### CASE NOTES

#### Exercise of Remedies.

The Arkansas Franchise Practices Act does not require that the right to the auxiliary remedy of repurchase be exercised only after the right to some initial remedies is exercised, and there is no

language implying such a legislative intent. *American Std., Inc. v. Miller Eng'g, Inc.*, 299 Ark. 347, 772 S.W.2d 344 (1989).

**Cited:** *Kent Jenkins Sales, Inc. v. Angelo Bros. Co.*, 804 F.2d 482 (8th Cir. 1986).

#### 4-72-210. Immunity granted those furnishing information.

No liability on the part of, and no cause of action of any nature other than as provided by this subchapter, shall arise against any franchisor, its officers, agents, or employees furnishing information as to reasons for termination, cancellation, intent not to renew, failure to renew, refusal to do business, or substantial change in competitive circumstances, unacceptability of a proposed transferee or relating to the character, financial ability, or business experience of a proposed transferee, or for statements made or evidence submitted at any hearing or trial conducted in connection therewith.

**History.** Acts 1977, No. 355, § 12; A.S.A. 1947, § 70-818.

### SUBCHAPTER 3 — FARM EQUIPMENT RETAILER FRANCHISE PROTECTION

#### SECTION.

4-72-301. Definitions.

4-72-302. Applicability of subchapter — Subchapter cumulative.

4-72-303. Security interests unaffected by subchapter — Bulk sales law inapplicable.

4-72-304. Wholesaler, manufacturer, or distributor to repurchase undamaged goods and cover cost of return.

4-72-305. Retailer's option on merchandise at termination of franchise.

#### SECTION.

4-72-306. Death of retailer equivalent to termination.

4-72-307. Inventory not required to be repurchased.

4-72-308. Title and possession of inventory.

4-72-309. Liability for failure to repurchase.

4-72-310. Violations.

4-72-311. Warranties.

**Effective Dates.** Acts 1979, No. 810, § 10: Apr. 10, 1979. Emergency clause provided: "It is hereby found and determined by the General Assembly that the present laws do not clearly prescribe the rights and responsibilities of retailers, wholesalers, manufacturers and distributors of farm implements, machinery, utility and industrial equipment, and parts,

when a contract or franchise is terminated; that the absence of a specific law on the subject has created serious hardships in certain cases; that this Act is designed to clearly define the relative rights and responsibilities of parties involved in such matters and should be given effect immediately. Therefore, an emergency is hereby declared to exist and this Act, being nec-

essary for the immediate preservation of the public peace, health, and safety, shall be in full force and effect from and after its passage and approval.”

Acts 1991, No. 996, § 7: Apr. 8, 1991. Emergency clause provided: “It is hereby found and determined by the Seventy-Eighth General Assembly that the present laws are not clear as to the rights and responsibilities of certain retailers of farm equipment when a contract or franchise is

terminated; that certain terms should be defined for clarity; that this act is needed to clearly define the rights and responsibilities when terminating a contract or franchise and should be effective immediately. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval.”

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#### **4-72-301. Definitions.**

As used in this subchapter, unless the context otherwise requires:

(1) “Current model” means a model listed in the wholesaler’s, manufacturer’s, or distributor’s current sales manual or any supplements thereto;

(2) “Current net price” means the price listed in the wholesaler’s, manufacturer’s, or distributor’s price list or catalogue in effect at the time the contract is canceled or discontinued, less any applicable trade and cash discounts;

(3) “Retailer” means any person, firm, or corporation engaged in the business of selling and retailing farm implements, machinery, utility and industrial equipment, lawn and garden outdoor powered machinery and equipment, attachments, or repair parts but shall not include retailers of petroleum and motor vehicle and related automobile care and replacement products normally sold by those retailers;

(4) “Inventory” means farm implements, machinery, utility and industrial equipment, lawn and garden outdoor powered machinery and equipment, attachments, and repair parts;

(5) “Net cost” means the price the retailer paid for the merchandise to the wholesaler, manufacturer, or distributor, less all applicable discounts allowed;

(6) “Manufacturer, wholesaler, or distributor” means a person, partnership, corporation, association, or other form of business enterprise engaged in the manufacturing, assembly, or wholesale distribution of farm implements, machinery, utility and industrial equipment, lawn and garden outdoor powered machinery and equipment, and attachments. The term also includes any successor in interest of the farm implements, machinery, utility and industrial equipment, lawn and garden outdoor powered machinery and equipment, and attachments manufacturer, including any purchaser of assets or stock, any surviving corporation resulting from merger or liquidation, any receiver or assignee, or any trustee of the original farm implements, machinery, utility and industrial equipment and attachments manufacturer; and

(7) “Dealership agreement” means an oral or written agreement of definite or indefinite duration between a farm implements, machinery, utility and industrial equipment and attachments manufacturer, and a

dealer which provides for the rights and obligations of the parties with respect to the purchase or sale of that equipment.

**History.** Acts 1979, No. 810, § 1; A.S.A. 1947, § 70-819; Acts 1991, No. 996, § 1.

#### **4-72-302. Applicability of subchapter — Subchapter cumulative.**

(a) The provisions of this subchapter shall apply to all contracts which have no expiration date and are continuing contracts and all other contracts entered into or renewed after July 1, 1979.

(b) Any contract in force and effect on June 1, 1977, which by its own terms will terminate on a date subsequent thereto, shall be governed by the law as it existed prior to this subchapter.

(c) The provisions of this subchapter shall apply only to inventory purchased after April 10, 1979.

(d) This subchapter is not intended and shall not be construed to repeal any provision of the Arkansas Franchise Practices Act, § 4-72-201 et seq.

**History.** Acts 1979, No. 810, § 9; A.S.A. 1947, § 70-826n.

#### **4-72-303. Security interests unaffected by subchapter — Bulk sales law inapplicable.**

The provisions of this subchapter shall not be construed to affect in any way any security interest which the wholesaler, manufacturer, or distributor may have in the inventory of the retailer, and any repurchase under the provisions of this subchapter shall not be subject to the provisions of the bulk sales law. The retailer, wholesaler, manufacturer, or distributor may furnish a representative to inspect all parts and certify their acceptability when packed for shipment.

**History.** Acts 1979, No. 810, § 8; A.S.A. 1947, § 70-826.

#### **4-72-304. Wholesaler, manufacturer, or distributor to repurchase undamaged goods and cover cost of return.**

(a) The wholesaler, manufacturer, or distributor shall repurchase that inventory previously purchased from him or her and held by the retailer on the date of termination of the contract.

(b) The wholesaler, manufacturer, or distributor shall pay one hundred percent (100%) of the net cost of all new, unsold, undamaged, and complete farm implements, machinery, utility and industrial equipment, and attachments, and one hundred percent (100%) of the current net price of all new, unused, and undamaged repair parts.

(c)(1) The wholesaler, manufacturer, or distributor shall pay the retailer five percent (5%) of the current net price on all new, unused,

and undamaged repair parts returned to cover the cost of handling, packing, and loading.

(2) The wholesaler, manufacturer, or distributor shall have the option of performing the handling, packing, and loading in lieu of paying the five percent (5%) for these services.

**History.** Acts 1979, No. 810, § 3; A.S.A. 1947, § 70-821.

#### **4-72-305. Retailer's option on merchandise at termination of franchise.**

Whenever any retailer enters into a franchise agreement, evidenced by a written contract with a wholesaler, manufacturer, or distributor wherein the retailer agrees to maintain an inventory, and the contract is terminated, then the wholesaler, manufacturer, or distributor shall repurchase the inventory as provided in this subchapter. The retailer may keep the inventory if he or she desires. If the retailer has any outstanding debts to the wholesaler, manufacturer, or distributor, then the repurchase amount may be credited to the retailer's account.

**History.** Acts 1979, No. 810, § 2; A.S.A. 1947, § 70-820.

#### **4-72-306. Death of retailer equivalent to termination.**

(a) In the event of the death of the retailer or the majority stockholder of a corporation operating as a retailer, the wholesaler, manufacturer, or distributor shall, at the option of the heir or heirs, repurchase the inventory from the heir or heirs of the retailer or majority stockholder as if the wholesaler, manufacturer, or distributor had terminated the contract. The heir or heirs shall have one (1) year from the date of the death of the retailer or majority stockholder to exercise their options under this subchapter.

(b) Nothing in this subchapter shall require the repurchase of any inventory if the heir or heirs and the wholesaler, manufacturer, or distributor enter into a new contract to operate the retail dealership.

**History.** Acts 1979, No. 810, § 7; A.S.A. 1947, § 70-825.

#### **4-72-307. Inventory not required to be repurchased.**

The provisions of this subchapter shall not require the repurchase from a retailer of:

- (1) Any repair part which has a limited storage life or is otherwise subject to deterioration, such as rubber items, gaskets, or batteries;
- (2) Any repair part which is in a broken or damaged package;
- (3) Any single repair part which is priced as a set of two (2) or more items;

(4) Any repair part which because of its condition is not resalable as a new part without repackaging or reconditioning;

(5) Any inventory for which the retailer is unable to furnish satisfactory evidence to the wholesaler, manufacturer, or distributor of clear title, free and clear of all claims, liens, and encumbrances;

(6) Any inventory which the retailer desires to keep, provided the retailer has a contractual right to do so;

(7) Any farm implements, machinery, utility and industrial equipment, lawn and garden outdoor powered machinery and equipment, and attachments which are not current models or which are not in new, unused, undamaged, complete condition;

(8) Any repair parts which are not in new, unused, undamaged condition;

(9) Any farm implements, machinery, utility and industrial equipment, lawn and garden outdoor powered machinery and equipment, or attachments which were purchased twenty-four (24) months or more prior to notice of termination of the contract;

(10) Any inventory which was ordered by the retailer on or after the date of notification of termination of the contract; or

(11) Any inventory which was acquired by the retailer from any source other than the wholesaler, manufacturer, or distributor.

**History.** Acts 1979, No. 810, § 5; A.S.A. 1947, § 70-823; Acts 1991, No. 996, § 2.

#### **4-72-308. Title and possession of inventory.**

Upon payment of the repurchase amount to the retailer, the title and right of possession to the repurchased inventory shall transfer to the wholesaler, manufacturer, or distributor.

**History.** Acts 1979, No. 810, § 4; A.S.A. 1947, § 70-822.

#### **4-72-309. Liability for failure to repurchase.**

If any wholesaler, manufacturer, or distributor fails or refuses to repurchase any inventory covered under the provisions of this subchapter within sixty (60) days after shipment of the inventory, he or she shall be civilly liable for one hundred percent (100%) of the current net price of the inventory, plus any freight charges paid by the retailer, the retailer's attorney's fees, court costs, and interest on the current net price computed at the legal interest rate from the sixty-first day after shipment.

**History.** Acts 1979, No. 810, § 6; A.S.A. 1947, § 70-824.

**4-72-310. Violations.**

(a) It is a violation of this subchapter for a manufacturer, wholesaler, or distributor to coerce a dealer to accept delivery of parts, accessories, or specialized tools which the dealer has not voluntarily ordered.

(b) It is a violation of this subchapter for a manufacturer to:

(1)(A) Condition or attempt to condition the sale of farm implements, machinery, utility and industrial equipment, lawn and garden outdoor powered machinery and equipment, and attachments on a dealer also purchasing other goods or services, except that a manufacturer may require the dealer to purchase those parts reasonably necessary to maintain the quality of operation in the field of the equipment used in the trade area and to purchase or lease such telecommunication equipment, including computer software, as is substantially and reasonably necessary to communicate with the manufacturer.

(B) Provided, however, that upon termination, nonrenewal, or cancellation of an equipment dealer franchise, the equipment manufacturer must reimburse the equipment dealer for all telecommunications equipment, including computer software, purchased by the equipment dealer in order to comply with the requirements of the equipment manufacturer that the dealer returns or offers to return to the equipment manufacturer, subject to a reasonable reduction for depreciation;

(2) Coerce or attempt to coerce a dealer into refusing to purchase the equipment manufactured by another equipment manufacturer;

(3)(A) Discriminate in the prices charged for equipment of like grade and quality sold by the equipment manufacturer to similarly situated equipment dealers.

(B) This does not prevent the use of volume discount or a differential which makes only due allowance for differences in the cost of manufacture, sale, or delivery, or for the differing methods by which or quantities in which the equipment is sold or delivered by the equipment manufacturer; or

(4) Attempt or threaten to terminate, cancel, fail to renew, or substantially change the competitive circumstances of the dealership agreement based on the result of a natural disaster, including a sustained drought in the dealership market area, labor dispute, or other circumstances beyond the dealer's control.

**History.** Acts 1991, No. 996, § 3.

## CASE NOTES

## ANALYSIS

Applicability.  
Natural Disaster.

**Applicability.**

Franchisee was not entitled to relief under subdivision (b)(4) of this section from a franchisor for termination of the parties' franchise agreement because actual termination, cancellation, failure to renew, or substantially changing the circumstances of a dealership agreement were not addressed in subdivision (b)(4). *Larry Hobbs Farm Equip., Inc. v. CNH Am., LLC*, 375 Ark. 379, 291 S.W.3d 190 (2009).

No liability under subdivision (b)(4) of this section is created when a manufacturer terminates, cancels, fails to renew, or substantially changes the competitive

circumstances of a dealership agreement based on re-branding of the product or ceasing to use a particular trade name or trademark for a product while selling it under a different trade name or trademark. *Larry Hobbs Farm Equip., Inc. v. CNH Am., LLC*, 375 Ark. 379, 291 S.W.3d 190 (2009).

**Natural Disaster.**

While the law includes "labor disputes" as natural disasters and "other circumstances beyond the dealer's control" is rather broad, defendant's business relationship with plaintiff's unauthorized competitor did not qualify as a natural disaster for the purposes of subdivision (b)(4) of this section. *Southern Implement Co. v. Deere & Co.*, 122 F.3d 503 (8th Cir. 1997).

**4-72-311. Warranties.**

(a) This section applies to a warranty claim submitted by a dealer.

(b)(1) Claims filed for payment under warranty agreements shall either be approved or disapproved within thirty (30) days of receipt by a manufacturer, wholesaler, or distributor.

(2) All claims for payment shall be paid within thirty (30) days of their approval.

(3)(A) If a claim is disapproved, the manufacturer, wholesaler, or distributor shall notify the dealer within thirty (30) days stating the specific grounds upon which the disapproval is based.

(B) If a claim is not specifically disapproved within thirty (30) days of receipt, it shall be deemed approved and payment by the manufacturer, wholesaler, or distributor shall follow within thirty (30) days.

(4) If, after termination of a contract, the dealer submits a claim to the manufacturer, wholesaler, or distributor for warranty work performed prior to the effective date of the termination, the manufacturer, wholesaler, or distributor shall accept or reject the claim within thirty (30) days of receipt.

(5) If a claim is not paid within the time allowed under this subsection, interest shall accrue at the maximum lawful interest rate.

(c)(1)(A) Warranty work performed by the dealer shall be compensated in accordance with the reasonable and customary amount of time required to complete the work, expressed in hours and fractions of hours.

(B) The time shall be multiplied by the dealer's established customer hourly retail labor rate, which shall have previously been made known to the manufacturer, wholesaler, or distributor.

(2) Expenses expressly excluded under the warranty of the manufacturer, wholesaler, or distributor to the customer shall not be included nor required to be paid on requests for compensation from the dealer for warranty work performed.

(3)(A) All parts used by the dealer in performing the warranty work shall be paid to the dealer in the amount equal to the dealer's net price for the parts, plus a minimum of fifteen percent (15%).

(B) The additional amount is to reimburse the dealer for reasonable costs of doing business in performing the warranty service on behalf of the manufacturer, wholesaler, or distributor, including, but not limited to, freight and handling costs incurred.

(4) The manufacturer, wholesaler, or distributor has the right to adjust compensation for errors discovered during audit, and if necessary, to adjust claims paid in error.

(d) The dealer shall have the right to accept the reimbursement terms and conditions of the manufacturer, wholesaler, or distributor in lieu of the terms and conditions of this section.

**History.** Acts 2001, No. 633, § 1.

## RESEARCH REFERENCES

**U. Ark. Little Rock L. Rev.** Survey of Legislation, 2001 Arkansas General Assembly, Business Law, 24 U. Ark. Little Rock L. Rev. 407.

## SUBCHAPTER 4 — PETROLEUM PRODUCTS SUPPLIERS AND DISTRIBUTORS

### SECTION.

4-72-401. Definitions.

4-72-402. Franchise — Cancellation or termination.

### SECTION.

4-72-403. Remedies for cancellation, termination, etc., of contract.

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**Effective Dates.** Acts 1975, No. 470, § 6: Mar. 19, 1975. Emergency clause provided: "It is hereby found and determined by the General Assembly that it is essential to the best interests of the consumers of petroleum products in this State, and to the best interest of petroleum products distributors that the supply of petroleum products be stable; that appropriate legislation should be enacted immediately to prohibit the indiscriminate and arbitrary

cancellation of petroleum products franchises of distributors; that this Act is designed to accomplish this purpose, and should be given effect immediately. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

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### 4-72-401. Definitions.

As used in this subchapter, unless the context otherwise requires:

(1) "Petroleum products supplier" means and includes any person, firm, corporation, subsidiary company, or other business entity engaged in the business of manufacturing, producing, or refining of petroleum products for sale or consignment to a petroleum products distributor;

(2) "Petroleum products distributor" means and includes any person, firm, corporation, or other business entity engaged in the business of selling petroleum products at wholesale as a jobber, distributor, consignee, agent, or in any other capacity; and

(3) "Franchise" means any agreement or contract between a petroleum products supplier and a petroleum products distributor whereby the supplier agrees to furnish or supply petroleum products to the distributor and the distributor agrees to purchase or accept on consignment or otherwise receive petroleum products from the supplier for sale at wholesale.

**History.** Acts 1975, No. 470, § 1; A.S.A. 1947, § 53-1001.

#### **4-72-402. Franchise — Cancellation or termination.**

(a) A petroleum products supplier shall not cancel, or otherwise terminate, a franchise with a petroleum products distributor, except for such specific reasons as shall be prescribed in the franchise.

(b)(1) If a petroleum products supplier proposes to cancel, fail to renew, or otherwise terminate a franchise with any distributor, he or she shall so notify the distributor by certified mail at least six (6) months prior to the date on which he or she proposes to cancel, fail to renew, or terminate the franchise.

(2) The notice shall include a statement of the grounds upon which the supplier bases his or her right to cancel or terminate the franchise.

(c) Only the following matters shall be included in the franchise as grounds for a petroleum products supplier to cancel or terminate the franchise of a petroleum products distributor:

(1) Criminal misconduct or willful violation of law relating to the business or premises of the supplier;

(2) Fraud;

(3) Failure of the distributor to pay taxes and to obtain and maintain all licenses, permits, and other authority necessary to conduct business as a distributor;

(4) Abandonment or unattendance of the business or premises of the supplier for such a period of time as may be specified in the franchise;

(5) Bankruptcy or insolvency of the distributor;

(6) The failure by the distributor to pay the supplier for petroleum products purchased or received on consignment from the supplier within the time and in the manner prescribed in the franchise;

(7) Nonpayment of rent or the loss by the refiner of its legal right to grant a distributor possession of the leased premises at which the business is located, if applicable, in which case, the supplier may terminate a distributor's marketing agreement upon a thirty-day notice of intent to terminate the agreement;

(8) Death or incapacity of the distributor or the termination or dissolution of a partnership or corporation;

(9) Adulteration or misrepresentation of products, provided that adulteration or misrepresentation which results from accident or circumstance beyond the control of the distributor shall not be grounds for termination;

(10) Force majeure, condemnation, or other public taking; or

(11) Failure of the distributor to substantially comply with any reasonable provisions of any lease agreement on bulk plant property between the supplier as lessor and the distributor as lessee.

(d) However, if a distributor violates subdivisions (c)(1), (2), or (4)-(6) of this section, the supplier having the right to terminate the marketing agreement may immediately terminate the agreement.

**History.** Acts 1975, No. 470, § 2; A.S.A. 1947, § 53-1002.

#### **4-72-403. Remedies for cancellation, termination, etc., of contract.**

If any petroleum products supplier shall cancel or otherwise terminate any franchise in violation of the provisions of this subchapter, the petroleum products distributor whose franchise is cancelled, or otherwise terminated, shall have a cause of action against the petroleum products supplier for specific performance, injunctive relief, or for actual damages sustained by the plaintiff as a result of the termination of the franchise, including ascertainable loss of good will as a result of the termination of the franchise. However, any action brought by a petroleum products distributor against a supplier for wrongful termination of a franchise shall be commenced within two (2) years after the wrongful termination.

**History.** Acts 1975, No. 470, § 3; A.S.A. 1947, § 53-1003.

### **SUBCHAPTER 5 — PETROLEUM PRODUCTS SUPPLIERS, DEALERS, AND DISTRIBUTORS**

#### **SECTION.**

4-72-501. Definitions.

4-72-502. Franchise — Cancellation or termination.

#### **SECTION.**

4-72-503. Remedies for cancellation, termination, etc., of franchise.

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**Effective Dates.** Acts 1975, No. 471, § 6: Mar. 19, 1975. Emergency clause provided: "It is hereby found and determined by the General Assembly that it is essential to the best interests of the consumers of petroleum products in this State, and to the best interests of petroleum products

dealers that the supply of petroleum products be stable; that appropriate legislation should be enacted immediately to prohibit the indiscriminate and arbitrary cancellation of petroleum products franchises of dealers; that this Act is designed to accomplish this purpose, and should be given

effect immediately. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

#### **4-72-501. Definitions.**

As used in this subchapter, unless the context otherwise requires:

(1) "Petroleum products supplier" means and includes any person, firm, corporation, subsidiary company, or other business entity engaged in the business of manufacturing, producing, or refining of petroleum products for sale or consignment to a petroleum products dealer;

(2) "Petroleum products dealer" means and includes any person, firm, corporation, or other business entity engaged in the business of selling petroleum products at retail;

(3) "Petroleum products distributor" means and includes any person, firm, corporation, or other business entity engaged in the business of selling petroleum products at wholesale as a jobber, distributor, consignee, agent, or in any other capacity; and

(4) "Franchise" means any agreement or contract between a petroleum products supplier or a petroleum products distributor and a petroleum products dealer whereby the supplier or distributor agrees to furnish or supply petroleum products to the dealer and the dealer agrees to purchase or accept on consignment or otherwise receive petroleum products from the supplier or distributor for retail sale.

**History.** Acts 1975, No. 471, § 1; A.S.A. 1947, § 53-1101.

#### **4-72-502. Franchise — Cancellation or termination.**

(a) A petroleum products supplier or a petroleum products distributor shall not cancel, refuse to renew, or otherwise terminate a franchise with a petroleum products dealer except as prescribed in this section.

(b)(1) If a petroleum products supplier or a petroleum products distributor proposes to cancel, to fail to renew, or to otherwise terminate a franchise with any petroleum products dealer, he shall so notify the dealer by certified mail at least thirty (30) days prior to the date on which he proposes to cancel, to fail to renew, or to terminate the franchise.

(2) The notice shall include a statement of the grounds upon which the supplier or distributor bases his right to cancel, refuse to renew, or terminate the franchise.

(c) Only the following matters shall be included in the franchise as grounds for a petroleum products supplier or petroleum products distributor to cancel or terminate the franchise of a petroleum products dealer:

(1) Criminal misconduct or violation of law relating to the business or premises of the dealer;

(2) Fraud;

(3) Failure of the dealer to pay taxes and to obtain and maintain all licenses, permits, and other authority necessary to conduct business as a dealer;

(4) Abandonment or unattendance of the business or premises of the dealer for such period of time as may be specified in the franchise;

(5) Bankruptcy or insolvency of the dealer;

(6) The failure by the dealer to pay the supplier or distributor for petroleum products purchased or received on consignment from the supplier or distributor within the time and in the manner prescribed in the franchise;

(7) Nonpayment of rent or the loss by the refiner or distributor of its legal right to grant a dealer possession of the leased premises at which the business is located;

(8) Death or incapacity of the dealer or the termination or dissolution of a partnership or corporation;

(9) Adulteration or misrepresentation of products;

(10) Force majeure, condemnation, or other public taking; or

(11) Failure to comply with the provisions of the marketing agreement regarding the responsibility of the dealer to maintain the premises in a safe, clean, and attractive condition.

(d) However, if a dealer abandons the business or premises for a period of time specified in the marketing agreement or violates one (1) or more provisions of subdivisions (c)(1)-(9) of this section, the supplier or distributor having the right to terminate the marketing agreement may do so immediately.

(e) A petroleum products supplier or distributor may not fail to renew a franchise unless:

(1) One (1) or more provisions of subsection (c) of this section are met; or

(2) The supplier or distributor and the dealer fail to agree to reasonable changes or reasonable additions to the terms of the franchise; or

(3) The supplier or distributor withdraws from the sale of motor fuels for sale other than resell in the state, one (1) or more counties thereof, or metropolitan areas; or

(4) The supplier or distributor intends to relinquish ownership or leasehold interest in the real estate premises on which the dealer conducts business; however, where two (2) or more separate noncontiguous real estate premises are involved, the franchise shall not be renewed as to the operations of the franchise related to the premises to be relinquished; or

(5) The real estate premises are to be used for purposes other than the sale or distribution of motor fuels; or

(6) The supplier or distributor intends to materially alter, add to, or replace improvements on the real estate premises; or

(7) The supplier or distributor received repeated consumer complaints concerning the conduct of a dealer's operation of a retail outlet; or

(8) The supplier and dealer agree to mutually terminate the franchise.

**History.** Acts 1975, No. 471, § 2; A.S.A. 1947, § 53-1102.

#### **4-72-503. Remedies for cancellation, termination, etc., of franchise.**

(a) If any petroleum products supplier or distributor cancels, refuses to renew, or otherwise terminates any franchise in violation of the provisions of this subchapter, the petroleum products dealer whose franchise is cancelled, not renewed, or otherwise terminated shall have a cause of action against the petroleum products supplier or petroleum products distributor for specific performance or injunctive relief, or for actual damages sustained by the plaintiff, as a result of the termination of the franchise, including ascertainable loss of goodwill as a result of the termination of the franchise.

(b) However, any action brought by a petroleum products dealer against a supplier or distributor for wrongful termination of a franchise shall be commenced within two (2) years after the wrongful termination.

**History.** Acts 1975, No. 471, § 3; A.S.A. 1947, § 53-1103.

### **SUBCHAPTER 6 — PROCEDURAL FAIRNESS FOR RESTAURANT FRANCHISEES**

#### **SECTION.**

4-72-601. Definitions.

4-72-602. Commencement of civil action or arbitration proceeding.

#### **SECTION.**

4-72-603. Applicability.

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### **RESEARCH REFERENCES**

**Am. Jur.** 62B Am. Jur. 2d, Priv. Fran. Cont., §§ 2, 3, 5, 756-891.

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#### **4-72-601. Definitions.**

As used in this subchapter, unless the context otherwise requires:

(1) "Franchisee" means a person to whom a restaurant franchise is granted;

(2) "Franchisor" means a person who grants or has granted a restaurant franchise; and

(3) "Restaurant franchise" means a contract or agreement, either express or implied, whether oral or written, between two (2) or more persons, by which:

(A) A franchisee is granted the right to engage in the business of offering, selling, or distributing food or beverages intended or suitable for immediate consumption on or off the premises of the franchisee under a marketing plan or system prescribed in substantial part by a franchisor; and

(B) Operation of the franchisee's business pursuant to that plan or system is substantially associated with the franchisor's trademark, service mark, trade name, logotype, advertising, or other commercial symbol designating the franchisor or its affiliate; and

(C) The franchisee pays or is required to pay, directly or indirectly, a franchise fee.

**History.** Acts 1993, No. 310, § 1.

#### **4-72-602. Commencement of civil action or arbitration proceeding.**

(a) A party to a restaurant franchise may commence a civil action or, if the restaurant franchise allows or compels arbitration of disputes, may initiate an arbitration proceeding, including an action or proceeding for violation of this subchapter, in Arkansas if either party to the restaurant franchise is a resident of Arkansas.

(b) Such action may be brought or arbitration initiated in the county in which the franchised restaurant is located or expected to be located or in which the principal place of business of the franchisee or franchisor is located.

**History.** Acts 1993, No. 310, § 2.

#### **4-72-603. Applicability.**

(a) This subchapter applies to a restaurant franchise operated in whole or in part in Arkansas and to the parties to the restaurant franchise.

(b) This subchapter may not be waived, and its application to a restaurant franchise or a party to a restaurant franchise may not be avoided, in whole or in part by agreement or by conduct, except as part of a settlement of a bona fide dispute.

(c) Neither a franchisee nor a franchisor shall be deprived of the application and benefits of this subchapter by a provision of a franchise purporting to designate the law of another jurisdiction as governing or interpreting the franchise, or to designate a venue outside of Arkansas for the resolution of disputes.

(d) To the extent permitted by the Constitution of the United States and the Constitution of the State of Arkansas, this subchapter is intended to apply to franchises granted, transferred, renewed, amended, replaced, or in existence on and after August 13, 1993.

**History.** Acts 1993, No. 310, §§ 3, 4.

## CHAPTER 73

### SALES AND EXHIBITIONS OF ART

#### SUBCHAPTER.

1. GENERAL PROVISIONS. [RESERVED.]
2. ARTISTS' CONSIGNMENT ACT.
3. SALES OF FINE PRINTS.

#### SUBCHAPTER 1 — GENERAL PROVISIONS

[Reserved]

#### SUBCHAPTER 2 — ARTISTS' CONSIGNMENT ACT

#### SECTION.

- 4-73-201. Title.
- 4-73-202. Definitions.
- 4-73-203. Applicability of subchapter.
- 4-73-204. Liability of art dealer for violation of subchapter.
- 4-73-205. Waiver of subchapter's provisions void.

#### SECTION.

- 4-73-206. Consigned artworks exempt from liens and security interests.
- 4-73-207. Delivery of work of fine art for exhibition or sale — Effects — Liability of dealer for damage or loss.

**Cross References.** Uniform Commercial Code, consignment sales provision not applicable, § 4-2-326.

Uniform Commercial Code, secured transactions, §§ 4-9-101 — 4-9-709.

#### RESEARCH REFERENCES

**Ark. L. Rev.** Note, Simmons First National Bank v. Wells: An Interpretation of

the Uniform Commercial Code's Consignment Rule, 37 Ark. L. Rev. 312.

#### 4-73-201. Title.

This subchapter may be cited as the "Artists' Consignment Act".

**History.** Acts 1983, No. 820, § 1; A.S.A. 1947, § 68-1806.

#### 4-73-202. Definitions.

As used in this subchapter, unless the context otherwise requires:

(1) "Art" means a painting, sculpture, drawing, work of graphic art, pottery, weaving, batik, macrame, quilt, or other commonly recognized art form;

(2) "Artist" means the creator of a work of art or, if he or she is deceased, his or her estate;

(3) "Art dealer" means a person engaged in the business of selling works of art; and

(4) "On consignment" means that no title to, or estate in, the goods or right to possession thereof superior to that of the consignor vests in the consignee, notwithstanding the consignee's power or authority to transfer and convey all of the right, title, and interest of the consignor in and to such goods to a third person.

**History.** Acts 1983, No. 820, § 2; A.S.A. 1947, § 68-1807.

#### **4-73-203. Applicability of subchapter.**

This subchapter shall not apply to any contract or arrangement in existence prior to July 4, 1983, nor to any extensions or renewals thereof; except that the parties to such contract or arrangement may thereafter elect to be governed by the provisions of this subchapter.

**History.** Acts 1983, No. 820, § 6; A.S.A. 1947, § 68-1811.

#### **4-73-204. Liability of art dealer for violation of subchapter.**

A violation by an art dealer of any of the provisions of this subchapter shall render the art dealer liable for damages to the artist in an amount equal to fifty dollars (\$50.00) plus the actual damages sustained by the artist, including incidental and consequential damages. In such actions, reasonable attorney's fees and court costs shall be paid to the prevailing party.

**History.** Acts 1983, No. 820, § 5; A.S.A. 1947, § 68-1810.

#### **4-73-205. Waiver of subchapter's provisions void.**

Any provision, whether oral or written, in or pertaining to the placing of a work of fine art on consignment whereby any provision of this subchapter is waived shall be deemed to be against public policy and shall be void.

**History.** Acts 1983, No. 820, § 6; A.S.A. 1947, § 68-1811.

#### **4-73-206. Consigned artworks exempt from liens and security interests.**

A work of art delivered to an art dealer for the purpose of exhibition or sale and the proceeds from the sale of the work by the dealer, whether to the dealer on his or her own account or to a third person, are not subject to the claims, liens, or security interests of the creditors of the art dealer, notwithstanding any law to the contrary.

**History.** Acts 1983, No. 820, § 3; A.S.A. 1947, § 68-1808.

**4-73-207. Delivery of work of fine art for exhibition or sale — Effects — Liability of dealer for damage or loss.**

Notwithstanding any custom, practice, or usage of the trade or any provision of law to the contrary:

(1) Whenever an artist delivers or causes to be delivered a work of fine art of his or her own creation to an art dealer for the purpose of exhibition or sale on a commission, fee, or other basis of compensation, the delivery to, and acceptance thereof by, the art dealer is deemed to place the work on consignment; and:

(A) The art dealer shall thereafter, with respect to the work, be deemed to be the agent of such artist;

(B) The work is trust property in the hands of the consignee for the benefit of the consignor; and

(C) Any proceeds from the sale of the work are trust funds in the hands of the consignee for the benefit of the consignor;

(2) Notwithstanding the subsequent purchase of a work of fine art by the consignee directly or indirectly for his or her own account, the work initially received on consignment shall be deemed to remain trust property until the price is paid in full to the consignor. If the work is thereafter resold to a bona fide third party before the consignor has been paid in full, the proceeds of the resale are trust funds in the hands of the consignee for the benefit of the consignor to the extent necessary to pay any balance still due to the consignor, and the trusteeship shall continue until the fiduciary obligation of the consignee with respect to the transaction is discharged in full; and

(3) Notwithstanding any law to the contrary, no such trust property or trust funds shall be subject to or subordinate to any claims, liens, or security interests of the consignee's creditors;

(4)(A) An art dealer is liable for negligent acts causing the loss of or damage to a work of fine art while it is in his possession.

(B) The value of the work of fine art is, for the purposes of this subdivision (4), the value established in a written agreement between the artist and the art dealer prior to the loss or damage of the work or, if no written agreement regarding the value of the work exists, the fair market value of the work less the art dealer's commission or fee.

**History.** Acts 1983, No. 820; § 4; A.S.A. 1947, § 68-1809.

**SUBCHAPTER 3 — SALES OF FINE PRINTS**

**SECTION.**

4-73-301. Definitions.

4-73-302. Applicability of subchapter.

4-73-303. Liability of seller for violation of subchapter.

**SECTION.**

4-73-304. Certificate of information to be furnished purchaser.

4-73-305. Information required on certificate.

**4-73-301. Definitions.**

As used in this subchapter, unless the context otherwise requires:

(1) "Artist" means the person who conceived or created or conceived and created the master image for, or which served as a model for, the print;

(2)(A) "Fine print" includes, but is not limited to, an engraving, etching, woodcut, lithograph, monoprint, or serigraph;

(B) A fine print is "signed" if the artist autographs the finished print, irrespective of whether it was signed or unsigned in the plate;

(3) "Impression" means the printed image on suitable material, whether paper or any other substance, made off the plate by printing, stamping, casting, or any other process commonly used in the graphic arts;

(4) "Plate" means the plate, stone, block, or other material used for the purpose of creating the print from which the impression or impressions were taken; and

(5) "Reproduction" means a copy of an original print made by a commercial mechanical process, but not a unique print made from the original plate.

**History.** Acts 1983, No. 819, § 1; A.S.A. 1947, § 68-1801.

**4-73-302. Applicability of subchapter.**

This subchapter applies only to fine prints printed after July 4, 1983.

**History.** Acts 1983, No. 819, § 4; A.S.A. 1947, § 68-1804.

**4-73-303. Liability of seller for violation of subchapter.**

(a) A person who offers or sells a fine print in violation of this subchapter shall be liable to the person purchasing the fine print. The purchaser may recover the consideration paid for the print with interest at the legal rate upon the tender of the print.

(b) In any case in which a person willfully offers or sells a fine print in violation of this subchapter, the person purchasing the fine print may recover from the person who offers or sells the fine print an amount equal to three (3) times the amount required under subsection (a) of this section.

**History.** Acts 1983, No. 819, § 5; A.S.A. 1947, § 68-1805.

**4-73-304. Certificate of information to be furnished purchaser.**

(a) No person engaged in the business of selling fine prints shall sell a fine print, at wholesale or at retail, unless the person furnishes the purchaser a certificate or a written invoice or receipt for the purchase

price which clearly and conspicuously discloses and warrants all of the applicable information about a fine print set forth in § 4-73-305.

(b) If the seller disclaims knowledge as to any applicable item of information set forth in § 4-73-305, the seller shall so state specifically and categorically with regard to each such item.

(c) If the seller describes a fine print as a reproduction, the seller need not furnish any further information, unless the edition was allegedly published in a signed, numbered, or limited edition, or any combination thereof, in which case all of the informational details are required to be furnished.

**History.** Acts 1983, No. 819, § 2; A.S.A. 1947, § 68-1802.

#### **4-73-305. Information required on certificate.**

The following information about a fine print shall be furnished as provided in § 4-73-304:

- (1) The name of the artist and the year when printed;
- (2) Exclusive of trial proofs, whether the edition is being offered as a limited edition, and, if so:
  - (A) The authorized maximum number of signed or numbered impressions, or both, in the edition;
  - (B) The authorized maximum number of unsigned or unnumbered impressions, or both, in the edition;
  - (C) The authorized maximum number of artist's, publisher's, printer's, or other proofs, if any, outside of the regular edition; and
  - (D) The total size of the edition;
- (3) Whether the plate has been destroyed, effaced, altered, defaced, or cancelled after the current edition;
- (4) If there were any prior states of the same impression, the total number of states, and a designation of the state to which the subject print relates;
- (5) If there were any prior or later editions from the same plate, the series number of the subject edition, and the total size of all other editions;
- (6) Whether the edition is a posthumous edition or restrike and, if so, whether the plate has been reworked; and
- (7) The name of the workshop, if any, where the edition was printed.

**History.** Acts 1983, No. 819, § 3; A.S.A. 1947, § 68-1803.

## **CHAPTER 74**

### **GOING-OUT-OF-BUSINESS SALES**

#### **SECTION.**

4-74-101. Definitions.

4-74-102. Penalty.

#### **SECTION.**

4-74-103. Sales excepted from chapter.

4-74-104. Enforcement of chapter.

## SECTION.

- 4-74-105. License requirement.  
4-74-106. Application for license.  
4-74-107. Bond.  
4-74-108. Duration of license — Extension — Display.  
4-74-109. Clerk's duties — Forms for applications and licenses.

## SECTION.

- 4-74-110. Seller may not continue business after sale.  
4-74-111. False representation concerning sale unlawful.

**4-74-101. Definitions.**

As used in this subchapter, unless the context otherwise requires:

(1) "Going-out-of-business sale" means and includes all sales advertised, represented, or held under the designation of "going out of business", "discontinuance of business", "selling out", "closing out", "liquidation", "lost our lease", "must vacate", "forced out", or any other designation of similar meaning; and

(2) "Person" means any individual, corporation, partnership, association, or other entity.

**History.** Acts 1983, No. 297, § 1; A.S.A. 1947, § 71-5501.

**4-74-102. Penalty.**

Any person conducting a going-out-of-business sale contrary to the provisions of this chapter who shall fail or refuse to comply with the requirements of this chapter or who shall violate any provision of this chapter shall be guilty of a Class A misdemeanor.

**History.** Acts 1983, No. 297, § 8; A.S.A. 1947, § 71-5508.

**4-74-103. Sales excepted from chapter.**

The provisions of this chapter shall not be applicable to any sale of goods, wares, or merchandise pursuant to any court order or direction nor to the sale of any goods, wares, or merchandise by any sheriff or other public official in the course of his or her official duties.

**History.** Acts 1983, No. 297, § 9; A.S.A. 1947, § 71-5509.

**4-74-104. Enforcement of chapter.**

It is the duty of the sheriff and other law enforcement officers in each county and the prosecuting attorney for each county to enforce the provisions of this chapter.

**History.** Acts 1983, No. 297, § 10; A.S.A. 1947, § 71-5510.

**4-74-105. License requirement.**

No person shall advertise or offer for sale a stock of goods, wares, or merchandise as a going-out-of-business sale unless that person has first obtained a license to conduct the sale from the county clerk of the county in which he or she proposes to conduct the sale.

**History.** Acts 1983, No. 297, § 2; A.S.A. 1947, § 71-5502.

**4-74-106. Application for license.**

(a) The application for the license shall be in writing and under oath and shall be filed with the clerk at least fourteen (14) days prior to the opening date of the proposed sale.

(b) The application shall show all the facts relating to the reasons and character of the sale, including the opening and closing dates of the proposed sale.

(c) The application for a license to conduct a going-out-of-business sale shall be accompanied by a fee of two hundred fifty dollars (\$250). However, if the applicant has been in business for a period of at least one (1) year at the location where the proposed going out of business sale is to be conducted, the license fee shall be twenty-five dollars (\$25.00).

**History.** Acts 1983, No. 297, §§ 2, 3; A.S.A. 1947, §§ 71-5502, 71-5503.

**4-74-107. Bond.**

(a) The application shall also be accompanied by a cash bond or a corporate surety bond in the amount of two thousand dollars (\$2,000) or five percent (5%) of the wholesale value of the goods proposed to be offered at the sale, whichever is lesser, and shall be in favor of the State of Arkansas.

(b) The proceeds of the bond shall be available to assure compliance with the provisions of this chapter and the payment of any and all taxes due the State of Arkansas or any political subdivision of the state as the result of the sale and shall also be available to satisfy any judgment which may be rendered against the merchant in favor of any purchaser of goods, wares, or merchandise at the sale based upon the sale of such merchandise, and which judgment is rendered pursuant to an action which is filed within one (1) year after the date on which the going-out-of-business sale is completed.

(c) The bond shall be maintained for at least one (1) year and shall be released by the clerk only upon proof being submitted by the licensee that the licensee has complied with all provisions of this chapter, has paid all taxes and penalties due the State of Arkansas or any political subdivision thereof, and that all judgments, if any, rendered against the applicant as a result of the sale have been paid and that no action is pending against the licensee as a result of the sale.

**History.** Acts 1983, No. 297, § 3; A.S.A. 1947, § 71-5503.

#### **4-74-108. Duration of license — Extension — Display.**

(a)(1) Each license issued for the conduct of a going-out-of-business sale shall be valid for a period of sixty (60) days, but the county clerk may extend the license for an additional period, not to exceed thirty (30) days, upon proof by the licensee that the licensee has been unable to complete the sale within the sixty-day period.

(2) If the county clerk grants an extension, the clerk shall issue a new license certificate.

(b) A person licensed under this chapter to conduct a going-out-of-business sale shall post a copy of the license certificate on each entrance door to the business.

**History.** Acts 1983, No. 297, § 5; A.S.A. 1947, § 71-5505; Acts 2007, No. 348, § 1. **Amendments.** The 2007 amendment added “Display” to the section heading; and added (a)(2) and (b) and made related change.

#### **4-74-109. Clerk’s duties — Forms for applications and licenses.**

(a)(1) The county clerk in each county shall design and cause to be printed appropriate forms for applications for licenses and for the license certificates to be issued to applicants under this chapter.

(2) The license certificate shall prominently display the beginning date and the ending date of the going-out-of-business sale.

(b) The county clerk to whom application is made for a license under the provisions of this chapter shall preserve such application and all information accompanying the application for a period of one (1) year from the date the license is issued.

**History.** Acts 1983, No. 297, § 4; A.S.A. 1947, § 71-5504; Acts 2007, No. 348, § 2. **Amendments.** The 2007 amendment added (a)(2) and made a related change.

#### **4-74-110. Seller may not continue business after sale.**

A person conducting a going-out-of-business sale licensed under the provisions of this chapter shall not, upon conclusion of the sale, continue to conduct a similar business at the same location or address at which the going-out-of-business sale was conducted.

**History.** Acts 1983, No. 297, § 6; A.S.A. 1947, § 71-5506.

#### **4-74-111. False representation concerning sale unlawful.**

(a) It is unlawful for any person, firm, corporation, association, or other business entity to falsely represent that the person or entity is going out of business or for any person or entity to misrepresent the ownership of a business for the purpose of or in connection with the conduct of a going-out-of-business sale.

(b)(1) Any going-out-of-business sale conducted in violation of this chapter shall constitute an unfair or deceptive act or practice as defined by the Deceptive Trade Practices Act, § 4-88-101 et seq.

(2) All remedies, penalties, and authority granted to the Attorney General under the Deceptive Trade Practices Act, § 4-88-101 et seq., shall be available to the Attorney General for the enforcement of this chapter.

**History.** Acts 1983, No. 297, § 7; A.S.A. 1947, § 71-5507; Acts 1993, No. 1057, § 1.

## CHAPTER 75

### UNFAIR PRACTICES

#### SUBCHAPTER.

1. GENERAL PROVISIONS. [RESERVED.]
2. UNFAIR PRACTICES ACT.
3. MONOPOLIES GENERALLY.
4. AUTOMOBILE DEALER'S ANTI-COERCION ACT.
5. PRICE DISCRIMINATION.
6. THEFT OF TRADE SECRETS.
7. UNFAIR CIGARETTE SALES ACT.
8. MILK AND OTHER DAIRY PRODUCTS.
9. MOTION PICTURES.

**Publisher's Notes.** Acts 1993, No. 380, §§ 1-18 provided: "SECTION 1. SHORT TITLE. This part shall be known and may be cited as the "Arkansas Petroleum Trade Practices Act."

"SECTION 2. DEFINITIONS. As used in this act, unless the context specifically requires otherwise, the term:

"(a) "Affiliate" shall mean any person who (other than by means of franchise) is controlled by, or is under common control with, any other person.

"(b) "Competition" shall mean the vying for motor fuel sales between two or more sellers in the same market area and at the same level of distribution.

"(c) "Cost of overhead" shall mean and include all costs incurred in the conduct of business at that retail location, including but not limited to labor, rent (which rent must be fair market value based on current use), interest on borrowed capital, depreciation, selling cost, maintenance of equipment, loss due to breakage or damage, credit card fees or other charges, credit losses and all types of licenses, taxes, insurance, advertising and environmental reporting and compliance, but

does not include the cost of environmental clean up or remediation.

"(d) "Cost to the retailer" means the sum of:

"(i) The lower of:

"(A) The purchase price of motor fuel to the retailer, less all trade discounts, allowances, or rebates actually granted to the retailer; or

"(B) The replacement cost of motor fuel at the time of retail sale in the quantity last purchased by the retailer; plus

"(ii) The cost of transportation of motor fuel from the point of purchase by the retailer to the retail location;

"(iii) All applicable federal, state, or local motor fuel or sales taxes not already included in the purchase price to the retailer; and

"(iv) The reasonable cost of overhead for motor fuel at that location.

"(e) "Dealer" shall mean any person, firm, corporation, or partnership, including a vertically integrated refiner, engaged in the sale of motor fuel to the public at retail.

"(f) "Distributor" shall mean any person engaged in the sale of motor fuel at wholesale to dealers.

"(g) "Exempt" shall mean those sales at retail exempted by Subsection (c) or (d) of Section 4.

"(h) "Motor fuel" shall mean gasoline, diesel fuel, alcohol or any mixture of these fuels, or any other fuel sold for use in automobiles and related vehicles. Each separate grade or blend of motor fuel shall be considered an individual item, product, and commodity.

"(i) "Person" shall mean any person, firm, association, organization, partnership, business trust, joint stock company, corporation, or legal entity, except that it does not include any public utility as that term is defined in Act 324 of 1935, as amended.

"(j) "Refiner" shall mean any person, including an affiliate, who is engaged directly or indirectly in the refining of motor fuel.

"(k) "Retailer" shall mean a dealer as defined in this act.

"(l) "Sale" includes, but is not limited to, a transfer, gift, sale, offer for sale, or advertisement for sale in any manner or by any means whatsoever, including a transfer of motor fuel from a person to itself or an affiliate at another level of distribution.

"(m) "Sale at retail," "sales at retail" or "retail sale" mean and include any transfer, made in the ordinary course of trade or in the usual pursuit of the seller's business, of title to tangible personal property to the purchaser for use or consumption and for valuable consideration. The above terms include any transfer of such property where title is retained as a security for the purchase price but is intended to be transferred later.

"(n) "Transfer price" shall mean the price used by a refiner in transferring motor fuel to its own or an affiliate for resale to another marketing level.

"(o) "Transportation cost" shall mean the actual cost of transportation of motor fuel or, in the absence of proof of actual cost, the common carrier rates fixed by the Arkansas Highway & Transportation Department for the immediate market area covered.

"(p) "Vertical integration" shall mean the ownership or control of the production of motor fuel including the refining, distribution, and resale of such motor fuel by a person, firm, partnership or corporation or from the refinery to the gasoline pump.

"(q) "Vertically integrated refiner" shall mean a refiner controlling all phases of petroleum production and sale from the refinery through distribution to dealers as defined herein.

"SECTION 3. PURPOSE.(a) The purpose of this act is to regulate vertical integration of the petroleum industry in Arkansas, it being the conclusion of the General Assembly hereby expressed that certain vertical integration may tend to operate in restraint of free trade and may inhibit full and free competition and therefore may tend to increase the price of motor fuel and services as prohibited in this act. It is also the purpose of this act to safeguard the public against the creation or perpetuation of monopolies in the marketing segment of the petroleum industry.

"(b) Independent and small dealers and distributors of motor fuel are vital to a healthy, competitive marketplace, but are unable to survive subsidized below-cost pricing at the retail level by others who have other sources of income. Fair and healthy competition in the marketing of motor fuel provides maximum benefits to consumers in this state, and certain marketing practices which impair such competition are contrary to the public interest. Predatory pricing practices are unfair trade practices and restraints which adversely affect motor fuel competition. Subsidized pricing is inherently predatory because it is unfair and destructive to, and reduces competition in, the motor fuel marketing industry. Below-cost selling and related laws have been effective in preserving independent and small retailers and wholesalers in other trades and businesses from subsidized and predatory pricing related to unfair practices.

"(c) Recovery under the federal anti-trust laws has become increasingly difficult due to the requirement of establishing an "antitrust injury." The legislature has determined that subsidized and predatory pricing presumptively injure competition by damaging independent dealers and distributors of motor fuel. Proof of an "antitrust injury" is unnecessary for recovery under this act.

"SECTION 4. SALES BELOW COST TO RETAILER.(a) No dealer shall make, or offer or advertise to make, sales at retail at below cost to the retailer of motor fuel, where the effect may injure competition, unless such sales at retail are ex-

empt under Subsection (c) or (d) of this Section. In calculating the cost to the retailer as defined in Subsection (d) of Section 2, it is the intention of the General Assembly that each separate grade or blend be considered an individual item, product, or commodity. The entire line or array of complimentary products need not be considered in calculating the cost to the retailer.

“(b) No vertically integrated refiner may sell or transfer motor fuel to its own or an affiliate retail outlet at a price which is less, after making adjustment for credit card and on-site retail outlet brand imaging fees, if any, than the price at which that motor fuel is offered for sale by the vertically integrated refiner to a dealer operating in the same class of trade and within the same competitive area as the retail outlet of the vertically integrated refiner.

“(c) Nothing in this section shall prohibit a dealer from making, or offering or advertising to make, sales at retail of motor fuel which are made in good faith to compete with the equally low or lower retail price of a competitor. However, while the previous sentence allows a dealer to make, offer or advertise, sales at a price equal to the retail price of a competitor, it does not authorize such dealer to make, offer or advertise to make, sales at retail at a price below such competitor if such sales would be in contravention with the provisions of this section.

“(d) The provisions of this section shall not apply:

“(i) Where motor fuel is advertised, offered for sale, or sold in a bona fide clearance sale for the purpose of discontinuing trade in such motor fuel, and said advertising, offer to sell, or sale shall state the reason thereafter and the quantity of such motor fuel advertised, offered for sale, or to be sold;

“(ii) Where motor fuel is sold upon the final liquidation of a business; or

“(iii) Where motor fuel is advertised, offered for sale, or sold by any fiduciary or other officer under the order or direction of any court; or

“(iv) Where motor fuel is sold during a grand opening to introduce a new or remodeled business. However, such grand opening shall not exceed 3 days and shall be held within 60 days from the date the

new or remodeled business begins operations.

“(e) Nothing contained within the provisions of this section shall be construed to regulate the price of motor fuel purchased from a refiner or a distributor:

“(i) By a person solely for use in agricultural production activities on the farm of such person;

“(ii) By an employer for the business use of his employees;

“(iii) By any common carrier regulated by the Arkansas Transportation Commission; or

“(iv) By a person for industrial and commercial purposes which do not include the sale of motor fuel to the public.

“(f) The burden of proving an exemption from the provisions of this section shall be upon the dealer claiming its sales are exempt.

**“SECTION 5. DISCRIMINATORY ALLOCATIONS.**(a) It is unlawful for a refiner to limit or allocate the quantity of motor fuel available to a dealer, distributor or other reseller purchasing under contract from such refiner unless the limitations or allocations are applied in a reasonable and nondiscriminatory manner among all resellers supplied by such refiner under contract in a general trade area and the refiner's own affiliate retail outlets.

“(b) It is also unlawful for a refiner to limit or allocate for more than five (5) days the quantity of motor fuel available to a dealer, distributor or other reseller purchasing under contract from such refiner, unless the limitations or allocations are applied in a reasonable and nondiscriminatory manner among all resellers supplied by such refiner under contract in a general trade area and the refiner's own retail outlets.

**“SECTION 6. CERTAIN REBATES UNLAWFUL.** It is unlawful for a refiner to offer or give a rebate or concession of any kind in connection with the sale of motor fuel for resale to a person when the refiner does not provide, on proportionately equal terms, the same rebate or concession to all persons purchasing for resale in a market area, where the effect may injure competition. However, a rebate or concession made in good faith to meet the same or an equivalent rebate or concession of a competitor shall not be a violation of this act. Such rebates or con-

cessions made pursuant to the authority in the previous sentence may equal, but not be greater than, the rebate or concession of a competitor.

**"SECTION 7. DISCLOSURE.**(a) All refiners doing business in this state are required to establish and publicly disclose upon request their "transfer prices" on all grades of motor fuel transferred or sold to itself or an affiliate for resale in this state at another marketing level of distribution.

**"(b)** In the absence of proof of the actual cost to a dealer, such cost may be presumed to be the lowest cost to the dealer within the same market area as determined by a cost survey.

**"(c)** Where a cost survey pursuant to recognized statistical and cost accounting practices has been made for a market area in which a violation of this act has been alleged to have been committed, to determine and establish on the basis of existing conditions the lowest cost to dealers within the said area, the said cost survey shall be deemed competent evidence in any proceeding or action under this act as tending to prove actual cost to the dealer. The party against whom such cost survey may be introduced in evidence shall have the right to offer to evidence tending to prove any inaccuracy of such cost survey or any state of facts which would impair the cost survey's probative value.

**"SECTION 8.**

**ENFORCEMENT.**(a) Any person who violates this act shall be subject to a civil penalty not to exceed One Thousand Dollars (\$1,000.00) per day for each day during which the act or omission continues or occurs.

**"(b)** The Attorney General may investigate any complaints regarding any violations of this act.

**"(c)** The Attorney General may bring an action in the name of the state in a court as described in Subsection (g) of Section 8, if there is a reasonable basis for believing that a violation of this act has occurred or is occurring, for appropriate relief, including civil penalties, a temporary restraining order, temporary injunction, or permanent injunction, against any person who has violated or is violating this section. All funds recovered by the Attorney General shall be paid to the state Treasury.

**"(d)** Any person having an interest which is or may be adversely affected by a violation or threatened violation of this

act may commence a civil action on his own behalf against any dealer who is alleged to be in violation of this act, to recover actual and special damages, for payment of civil penalties, and to enjoin the dealer who has violated, is violating or who is otherwise likely to violate this section.

**"(e)** No action may be commenced under Subsection (d) of Section 8 prior to ten (10) days after the plaintiff has given notice by certified mail of the alleged violation to any alleged violator and to the Attorney General.

**"(f)** If the court finds that the violations were willful or knowing violations, the court may award three (3) times the actual damage sustained and may provide such other relief as it considers necessary and proper. It shall be presumed that retail sales below cost by a dealer after he has received the notice required in Subsection (e) of Section 8 are willful and knowing.

**"(g)** An action pursuant to the provisions of this section shall be brought in a court of competent jurisdiction in the county where the alleged or threatened violation of this act took place, is taking place, or in the county in which such dealer or refiner resides, has his principal place of business, or can be found.

**"(h)** In any action filed under this act, the prevailing party may be allowed a reasonable attorney fee to be assessed by the court and collected as costs. However, an attorney fee shall not be assessed against the Attorney General or the state.

**"SECTION 9. PRIVATE ACTION PRESUMPTION.**(a) In any action brought under this chapter, upon a prima facie showing of a violation, the burden of rebutting the prima facie case thus made shall shift to the defendant. A prima facie showing of a violation shall be constituted if the plaintiff shows:

**"(i)** That the plaintiff's purchase price from a refiner or distributor is greater than said refiner's transfer price; or,

**"(ii)** That the plaintiff's purchase price from a refiner or distributor plus the plaintiff's cost of doing business is greater than said refiner's or distributor's retail posted sales price; or,

**"(iii)** That the plaintiff's basic cost of motor fuel plus the plaintiff's cost of doing business is greater than the posted sales price at a retail location of a competitor,

within plaintiff's marketing area, suspected of selling motor fuel in violation of this chapter.

"(b) A plaintiff may utilize the presumption created by this section only if the plaintiff notifies the alleged violator by certified mail ten (10) days prior to commencing an action of the cost data the plaintiff has knowledge of at the time that the plaintiff reasonably believes gives rise to a violation under this act.

"(c) A party may rebut the presumption created by this section by presenting evidence to establish his cost of the grade, brand or blend of motor fuel in question, or by qualifying for an exception under § 4(c) and (d).

"SECTION 10. Provisions of this act shall expire four (4) years after its effective date.

"SECTION 11. SEVERABILITY. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

"SECTION 12. CONFLICT WITH FEDERAL LAWS. If any provision of this act is found to conflict with federal requirements which are a prescribed condition to the allocation of federal funds to the state, the conflicting part of this act is hereby declared to be inoperative solely to the extent of the conflict, and such finding or determination shall not affect the operation of the remainder of this act.

"SECTION 13. CONSTRUCTION OF THE ACT. This act is remedial legislation and shall be liberally construed to promote its purposes. The powers and remedies in this section shall be cumulative and supplementary to all other powers

and remedies otherwise provided by law.

"SECTION 14. REMEDIES CUMULATIVE. Nothing in this act shall be construed as repealing any other legislation, or portion thereof, but the remedies herein provided shall be cumulative to all other remedies provided by law.

"SECTION 15. All provisions of this act of a general and permanent nature are amendatory to the Arkansas Code of 1987 Annotated and the Arkansas Code Revision Commission shall incorporate the same in the Code.

"SECTION 16. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

"SECTION 17. All laws and parts of laws in conflict with this act are hereby repealed.

"SECTION 18. EMERGENCY. It is hereby found and determined by the Seventy-Eighth General Assembly of the State of Arkansas that subsidized below cost pricing, discriminatory allocations, and other unfair trade practices in the marketing segment of the petroleum industry are threatening small and independent petroleum marketers and therefore, free and healthy competition. Therefore, in order to address this serious issue, an emergency is hereby declared to exist, and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

For Commentary regarding the Uniform Trade Secrets Acts, see Commentaries Volume A.

## CASE NOTES

### Constitutionality of Acts 1993, No. 380.

Acts 1993, No. 380, held constitutionally infirm because of its failure to include an element of predatory intent for a violation; as a consequence, the act is overbroad in its effect and impermissibly impinges on the due process rights of a

petroleum company. *Ports Petro. Co. v. Tucker*, 323 Ark. 680, 916 S.W.2d 749 (1996).

Acts 1993, No. 380, § 4 violates the due process clause of the Arkansas Constitution and is void and of no effect; to the extent § 4 is independent from the balance of the act, its invalidity shall not

affect the other provisions and applications of the act. *Ports Petro. Co. v. Tucker*, 323 Ark. 680, 916 S.W.2d 749 (1996).

## SUBCHAPTER 1 — GENERAL PROVISIONS

[Reserved]

## SUBCHAPTER 2 — UNFAIR PRACTICES ACT

### SECTION.

- 4-75-201. Title.
- 4-75-202. Purpose.
- 4-75-203. Construction.
- 4-75-204. Penalties.
- 4-75-205. Forfeiture of charter, rights, etc. — Proceedings.
- 4-75-206. Contracts violating subchapter illegal.
- 4-75-207. Destruction of competition by price discrimination prohibited.
- 4-75-208. Secret payments or allowance of rebates, refunds, etc. — Penalty.
- 4-75-209. Sale at less than cost or with intent to injure competitors.

### SECTION.

- 4-75-210. Liability of directors, officers, agents, etc. — Proof of unlawful intent.
- 4-75-211. Remedies — Witnesses and documents — Immunity.
- 4-75-212. Civil actions and settlements by the Attorney General.
- 4-75-213. Person defined.
- 4-75-214. Awards to the Attorney General — Use of moneys.
- 4-75-215. Action not barred because it affects interstate or foreign commerce.
- 4-75-216. Venue.
- 4-75-217. Statute of limitations.

**Cross References.** Going-out-of-business sales, § 4-74-101 et seq.

**Effective Dates.** Acts 1937, No. 253, § 15: Mar. 17, 1937. Emergency clause provided: "This act is hereby declared to be an emergency measure necessary for the immediate preservation of the public peace, health and safety, within the meaning of section 1 of Article V of the Constitution, and shall therefore go into immediate effect. The facts constituting the necessity are as follows: "The sale at less than cost of goods obtained at forced, bankrupted, close out, and other sales outside of the ordinary channels of trade is destroying healthy competition and thereby forestalling recovery. If such practices are not immediately stopped many more businesses will be forced into bankruptcy, this increasing the prevailing condition of depression. In order to prevent such occurrences it is necessary that this act go into effect immediately."

Acts 2003, No. 1172, § 5: Apr. 8, 2003. Emergency clause provided: "It is found and determined by the Eighty-fourth General Assembly that without the amendments herein, the Attorney General is unable to adequately protect the interests of the consumers of the State of Arkansas under the provisions of the Unfair Trade Practices Act and the chapter on Monopolies Generally for harm they have suffered as indirect purchasers. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

## RESEARCH REFERENCES

**ALR.** Failure to deliver ordered merchandise to customer on date promised as unfair or deceptive trade practice. 7 A.L.R.4th 1257.

Award of attorneys' fees in actions under state deceptive trade practice and consumer protection acts. 35 A.L.R.4th 12.

State statute forbidding unfair trade practice or competition by discriminatory allowance of rebates, commissions, discounts, or the like. 41 A.L.R.4th 675.

Impugning quality or worth of merchandise or products. 42 A.L.R.4th 318.

Implied warranty coverage for service transactions under state consumer protection and deceptive trade statutes. 72 A.L.R.4th 282.

Coverage of insurance transactions under state consumer protection statutes. 77 A.L.R.4th 991.

Coverage of leases under state consumer protection statutes. 89 A.L.R.4th 854.

Trademark licensor's liability for injury or death allegedly due to defect in licensed product. 90 A.L.R.4th 981.

Constitutional right to jury trial in cause of action under state unfair or deceptive trade practices law. 54 A.L.R.5th 631.

**Am. Jur.** 54A Am. Jur. 2d, Monop., §§ 781 et seq., 1069 et seq.

**C.J.S.** 58 C.J.S., Monop., § 56 et seq.

87 C.J.S., Trademarks, etc., § 380 et seq.

## CASE NOTES

## ANALYSIS

Constitutionality.

In General.

Construction.

Applicability.

**Constitutionality.**

The complaint that the Unfair Practices Act is void under the constitution because it fails to define with reasonable certainty the acts it declares unlawful, the particular language complained of as being vague and indefinite being "to discriminate between different sections, communities or cities or portions thereof, or between different locations in such sections, communities, cities or portions thereof in this state" was not tenable, the language sets forth as definite a standard as the evil to be regulated will permit. *Concrete, Inc. v. Arkhola Sand & Gravel Co.*, 230 Ark. 315, 322 S.W.2d 452 (1959).

**In General.**

The reasoning and interpretation of the court decisions under the Robinson-Pat-

man Act also apply to the Arkansas Unfair Practices Act. *Ideal Plumbing Co. v. Benco, Inc.*, 382 F. Supp. 1161 (W.D. Ark. 1974), *aff'd*, 529 F.2d 972 (8th Cir. 1976).

**Construction.**

The Unfair Practices Act is penal in nature and imposes liabilities unknown at common law; therefore it must be strictly construed in favor of those upon whom the burden is sought to be imposed and that which is not clearly expressed will not be taken as intended. *Beam v. Monsanto Co.*, 259 Ark. 253, 532 S.W.2d 175 (1976).

**Applicability.**

A competitor that has been injured by legitimate competitive pricing should not be permitted to use this subchapter as a fountain for recouping its losses. *Wal-Mart Stores, Inc. v. American Drugs, Inc.*, 319 Ark. 214, 891 S.W.2d 30 (1995).

**Cited:** *Energy Oil Co. v. Rose Oil Co.*, 250 Ark. 484, 465 S.W.2d 690 (1971); *Arkota Indus., Inc. v. Naekel*, 274 Ark. 173, 623 S.W.2d 194 (1981); *Baxley-Delamar Monuments, Inc. v. American Cem. Ass'n*, 843 F.2d 1154 (8th Cir. 1988).

## 4-75-201. Title.

This subchapter shall be known and designated as the "Unfair Practices Act".

**History.** Acts 1937, No. 253, § 14; A.S.A. 1947, § 70-314.

### CASE NOTES

#### **Jurisdiction.**

Circuit court erred when it determined that a claim of an illegal tying arrangement based on an alleged forced purchase by a franchisee could not have fallen under state statutes; federal jurisdiction was not exclusive in these matters under the Sherman Act, 15 U.S.C.S. § 1 et seq., moreover, a finding that a state claim could not have prevailed or that defenses existed was improper at the class certification stage because the only permissible inquiry was whether the elements of this rule had been satisfied. *Carquest of Hot Springs, Inc. v. General Parts, Inc.*, 367 Ark. 218, 238 S.W.3d 916 (2006).

Under 28 U.S.C.S. § 1491, the court lacked jurisdiction over a direct attack on the propriety of a federal bid; thus, Veterans Administration outpatient clinic operator's claims under the Arkansas Unfair Practices Act against the healthcare provider based on the provider's receipt of a federal contract were denied. *Valor Healthcare, Inc. v. Pinkerton*, 620 F. Supp. 2d 974 (W.D. Ark. 2009).

**Cited:** *Laidlaw Waste Sys. v. City of Ft. Smith*, 742 F. Supp. 540 (W.D. Ark. 1990); *Jackson v. Swift-Eckrich*, 830 F. Supp. 486 (W.D. Ark. 1993).

#### **4-75-202. Purpose.**

The General Assembly declares that the purpose of this subchapter is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition by prohibiting unfair and discriminatory practices by which fair and honest competition is destroyed or prevented.

**History.** Acts 1937, No. 253, § 13; Pope's Dig., § 14323; A.S.A. 1947, § 70-313.

### CASE NOTES

#### ANALYSIS

Competition.

Persons Protected.

#### **Competition.**

This subchapter is intended to foster competition for the primary benefit of the general public by protecting dealers, especially small dealers, from unfair competition by large dealers. *Beam v. Monsanto Co.*, 259 Ark. 253, 532 S.W.2d 175 (1976).

Comparative pricing appears to foster and encourage competition which is one of

the purposes of the Arkansas Unfair Practices Act. *Wal-Mart Stores, Inc. v. American Drugs, Inc.*, 319 Ark. 214, 891 S.W.2d 30 (1995).

#### **Persons Protected.**

This subchapter is intended primarily to afford protection to the competitor of a seller. *Concrete, Inc. v. Arkhola Sand & Gravel Co.*, 230 Ark. 315, 322 S.W.2d 452 (1959).

**Cited:** *Jackson v. Swift-Eckrich*, 830 F. Supp. 486 (W.D. Ark. 1993).

#### **4-75-203. Construction.**

This subchapter shall be literally construed so that its beneficial purposes may be subserved.

**History.** Acts 1937, No. 253, § 13; Pope's Dig., § 14323; A.S.A. 1947, § 70-313.

#### CASE NOTES

##### **Statute of Limitations.**

This subchapter contains no limitation period, which results in the application of the general catch-all five year statute found in § 16-56-115. *Jackson v. Swift-*

*Eckrich*, 830 F. Supp. 486 (W.D. Ark. 1993).

**Cited:** *Concrete, Inc. v. Arkhola Sand & Gravel Co.*, 230 Ark. 315, 322 S.W.2d 452 (1959).

#### **4-75-204. Penalties.**

Any person, firm, or corporation, whether as principal, agent, officer, or director for himself or herself or itself, for another person, or for any firm or corporation, that shall violate any of the provisions of this subchapter is guilty of a Class A misdemeanor for each single violation.

**History.** Acts 1937, No. 253, § 11; Pope's Dig., § 14321; A.S.A. 1947, § 70-311; Acts 2005, No. 1994, § 340.

#### **4-75-205. Forfeiture of charter, rights, etc. — Proceedings.**

(a) Upon the third violation of any of the provisions of this subchapter by any corporation, it shall be the duty of the Attorney General to institute proper suits or quo warranto proceedings in any court of competent jurisdiction for the forfeiture of its charter, rights, franchises, or privileges and powers exercised by the corporation, and to permanently enjoin it from transacting business in this state.

(b) If in such action the court finds that the corporation is violating or has violated any of the provisions of this subchapter, it must enjoin the corporation from doing business in this state permanently or for such time as the court shall order, or must annul the charter or revoke the franchise of the corporation.

**History.** Acts 1937, No. 253, § 8; Pope's Dig., § 14318; A.S.A. 1947, § 70-308.

#### **4-75-206. Contracts violating subchapter illegal.**

Any contract, express or implied, made by any person, firm, or corporation in violation of any of the provisions of this subchapter is declared to be an illegal contract and no recovery thereon shall be had.

**History.** Acts 1937, No. 253, § 9; Pope's Dig., § 14319; A.S.A. 1947, § 70-309.

**4-75-207. Destruction of competition by price discrimination prohibited.**

(a) It shall be unlawful for any person, firm, or corporation doing business in the State of Arkansas and engaged in the production, manufacture, distribution, or sale of any commodity or product or of service or output of a service trade of general use or consumption or of the product or service of any public utility with the intent to destroy the competition of any regular established dealer in the commodity, product, or service, or to prevent the competition of any person, firm, private corporation, or municipal or other public corporation who or which in good faith intends and attempts to become a dealer to discriminate between different sections, communities, or cities or portions thereof, or between different locations in the sections, communities, cities, or portions thereof in this state, by selling or furnishing the commodity, product, or service at a lower rate in one (1) section, community, or city or any portion thereof, or in one (1) location in the section, community, or city or any portion thereof, than in another, after making allowance for difference, if any, in the grade, quality, or quantity and in the actual cost of transportation from the point of production, if a raw product or commodity, or from the point of manufacture, if a manufactured product or commodity.

(b) The inhibition of this section against locality discrimination shall include any scheme of special rebates, collateral contracts, or any device of any nature whereby such discrimination is, in substance or fact, effected in violation of the spirit and intent of this subchapter.

(c) This subchapter shall not be construed to prohibit the meeting in good faith of a competitive rate, or to prevent a reasonable classification of service by public utilities for the purpose of establishing rates.

**History.** Acts 1937, No. 253, § 1; Pope's Dig., § 14311; A.S.A. 1947, § 70-301.

**CASE NOTES****ANALYSIS**

Constitutionality.

Applicability.

Remedy in Seller Only.

**Constitutionality.**

The complaint that the Unfair Practices Act is void under the constitution because it fails to define with reasonable certainty the acts it declares unlawful, the particular language complained of as being vague and indefinite being "to discriminate between different sections, communities or cities or portions thereof, or between different locations in such sections, communities, cities or portions thereof in this state" was not tenable, the language sets

forth as definite a standard as the evil to be regulated will permit. *Concrete, Inc. v. Arkhola Sand & Gravel Co.*, 230 Ark. 315, 322 S.W.2d 452 (1959).

**Applicability.**

This subchapter does not apply to interstate price discrimination; this subchapter, by its very terms, applies only to price discrimination between one area in Arkansas and another area in Arkansas. *Chalmers v. Toyota Motor Sales, USA, Inc.*, 326 Ark. 895, 935 S.W.2d 258 (1996).

**Remedy in Seller Only.**

Photographer could not recover triple damages from school district under the Unfair Practices Act for entering into a

contract with another photographer which required payment of "commission" in return for the exclusive right to take pictures, since the act only provides a remedy in favor of one seller against an-

other seller and the school district was either a buyer of photographs or an agent of the student or parent buyers. *Burge v. Pulaski County Special Sch. Dist.*, 272 Ark. 67, 612 S.W.2d 108 (1981).

#### **4-75-208. Secret payments or allowance of rebates, refunds, etc. — Penalty.**

(a) The secret payment or allowance of rebates, refunds, commissions, or unearned discounts is an unfair trade practice, whether in the form of money or otherwise or secretly extending to certain purchasers special services or privileges not extended to all purchasers purchasing upon like terms and conditions to the injury of a competitor and where the payment or allowance tends to destroy competition.

(b) Any person, firm, partnership, corporation, or association resorting to such trade practice shall be guilty of a Class A misdemeanor.

**History.** Acts 1937, No. 253, § 7; Pope's Dig., § 14317; A.S.A. 1947, § 70-307; Acts 2005, No. 1994, § 341.

### **RESEARCH REFERENCES**

**Ark. L. Rev.** Recent Development: Arkansas Unfair Trade Practices Act — Tortious Interference, 58 Ark. L. Rev. 1005.

### **CASE NOTES**

#### **ANALYSIS**

Purpose.  
Destruction of Competition.  
Price Reductions.  
Public Use.  
Rebates.  
Secret Payments.

#### **Purpose.**

The purpose of this section is to regulate hard bargaining between a general contractor and its subcontractor especially in the absence of any evidence of commercial bribery or secret payments given or extracted. *Ideal Plumbing Co. v. Benco, Inc.*, 529 F.2d 972 (8th Cir. 1976).

#### **Destruction of Competition.**

This section requires proof "that the payment of allowance must tend to destroy competition." *Ideal Plumbing Co. v. Benco, Inc.*, 529 F.2d 972 (8th Cir. 1976).

#### **Price Reductions.**

Where reductions were made in a bid by a bargaining potential seller to arrive at

an agreed contract price and there was no evidence of any adverse effect on competition and such reductions were reflected in the final subcontract and not secret in any way, then there were no violations. *Ideal Plumbing Co. v. Benco, Inc.*, 382 F. Supp. 1161 (W.D. Ark. 1974), *aff'd*, 529 F.2d 972 (8th Cir. 1976).

#### **Public Use.**

This business of operating a public cotton gin is impressed with a public interest and this section constitutes a valid exercise of legislative power to regulate any business dedicated to a public use. *Baratti v. Koser Gin Co.*, 206 Ark. 813, 177 S.W.2d 750 (1944).

#### **Rebates.**

Where defense was based upon this section, defendant had burden to show that rebate was secret, not paid to all patrons upon like terms and conditions, and it tended to destroy competition. *Baratti v. Koser Gin Co.*, 206 Ark. 813, 177 S.W.2d 750 (1944).

Where there was testimony indicating that the fact that gin company was paying rebates on ginning charges was known to numerous farmers, whether agreement for rebate was a secret one, was a question of fact for the jury. *Baratti v. Koser Gin Co.*, 206 Ark. 813, 177 S.W.2d 750 (1944).

Alleged "kickbacks" did not violate this section where charges were the same to all customers and did not tend to destroy competition. *Arkansas State Bd. of Optometry v. Keller*, 218 Ark. 820, 239 S.W.2d 14 (1951).

### **Secret Payments.**

Where a high school annually entered into informal open bidding with photographers to take senior class pictures and openly received a "commission" on the sales of the photographs, which were applied to school purposes, there was no "secret" payment of kickbacks as prohibited by this section and no violation of the Unfair Practices Act by the school district. *Burge v. Pulaski County Special Sch. Dist.*, 272 Ark. 67, 612 S.W.2d 108 (1981).

## **4-75-209. Sale at less than cost or with intent to injure competitors.**

(a)(1) It shall be unlawful for any person, partnership, firm, corporation, joint-stock company, or other association engaged in business within this state to:

(A) Sell, offer for sale, or advertise for sale any article or product or service or output of a service trade at less than the cost thereof to the vendor; or

(B) Give, offer to give, or advertise the intent to give away any article or product or service or output of a service trade for the purpose of injuring competitors and destroying competition.

(2) Any person or entity so doing shall be guilty of a Class A misdemeanor.

(b)(1) The term "cost" as applied to production is defined as including the cost of raw materials, labor, and all overhead expenses of the producer and as applied to the distribution, "cost" shall mean the invoice or replacement cost, whichever is lower, of the article or product to the distributor and vendor plus the cost of doing business by the distributor and vendor.

(2) The "cost of doing business" or "overhead expense" is defined as all costs of doing business incurred in the conduct of the business and must include without limitation the following items of expense: labor, which includes salaries of executives and officers, rent, interest on borrowed capital, depreciation, selling cost, maintenance of equipment, delivery cost, credit losses, all types of licenses, taxes, insurance, and advertising.

(c) In establishing the cost of a given article or product to the distributor and vendor, the invoice cost of the article or product purchased at a forced, bankrupt, closeout sale, or other sale outside of the ordinary channels of trade may not be used as a basis for justifying a price lower than one based upon the replacement cost as of the date of the sale of the article or product replaced through the ordinary channels of trade, unless:

(1) The article or product is kept separate from goods purchased in the ordinary channels of trade; and

(2) The article or product is advertised and sold as merchandise purchased at a forced, bankrupt, or closeout sale, or by means other than through the ordinary channels of trade, and the advertising states the conditions under which the goods were so purchased and the quantity of the merchandise to be sold or offered for sale.

(d) In any injunction proceeding or in the prosecution of any person as officer, director, or agent, it shall be sufficient to allege and prove the unlawful intent of the person, firm, or corporation for whom or which he or she acts.

(e) Where a particular trade or industry of which the person, firm, or corporation complained against is a member has an established cost survey for the locality and vicinity in which the offense is committed, the cost survey shall be deemed competent evidence to be used in proving the costs of the person, firm, or corporation complained against within the provisions of this subchapter.

(f) The provisions of this section shall not apply to any sale made:

(1) In closing out in good faith the owner's stock or any part thereof for the purpose of discontinuing his or her trade in the stock or commodity, and in the case of the sale of seasonal goods or to the bona fide sale of perishable goods, to prevent loss to the vendor by spoilage or depreciation, if notice is given to the public thereof;

(2) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof;

(3) By an officer acting under the orders of any court; or

(4) In an endeavor made in good faith to meet the legal prices of a competitor as herein defined selling the same article or product or service or output of a service trade, in the same locality or trade area.

(g) Any person, firm, or corporation who performs work upon, renovates, alters, or improves any personal property belonging to another person, firm, or corporation shall be construed to be a vendor within the meaning of this subchapter.

**History.** Acts 1937, No. 253, §§ 3-6; §§ 70-303 — 70-306; Acts 2005, No. 1994, Pope's Dig., §§ 14313-14316; A.S.A. 1947, § 342.

## RESEARCH REFERENCES

**Ark. L. Rev.** Wal-Mart Stores Inc. v. American Drugs, Inc: Drawing the Line Between Predatory and Competitive Pricing, 50 Ark. L. Rev. 103.

## CASE NOTES

### ANALYSIS

Construction.  
Burden of Proof.

### Construction.

This section is penal in nature and must be strictly construed in favor of those upon whom the burden of the penalty is sought

to be imposed. Wal-Mart Stores, Inc. v. American Drugs, Inc., 319 Ark. 214, 891 S.W.2d 30 (1995).

The strategy of selling below the competitors' price, and even below seller's own cost, is markedly different from a sustained effort to destroy competition in one article by selling below cost over a prolonged period of time: subdivision (a)(1) of

this section does not make loss leaders illegal, and plainly does not contemplate a prima facie case of predation based on loss-leader sales. *Wal-Mart Stores, Inc. v. American Drugs, Inc.*, 319 Ark. 214, 891 S.W.2d 30 (1995).

#### **Burden of Proof.**

For a violation to occur under subdivision (a)(1) of this section, below-cost sales

must be made for the purpose of destroying competition; mere proof of below-cost sales is not sufficient. *Wal-Mart Stores, Inc. v. American Drugs, Inc.*, 319 Ark. 214, 891 S.W.2d 30 (1995).

**Cited:** *McLane Co. v. Weiss*, 332 Ark. 284, 965 S.W.2d 109 (1998).

### **4-75-210. Liability of directors, officers, agents, etc. — Proof of unlawful intent.**

(a) Any person who, either as director, officer, or agent of any firm or corporation or as agent of any person violating the provisions of this subchapter, assists or aids, directly or indirectly, in the violation shall be responsible therefor equally with the person, firm, or corporation for whom or which he or she acts.

(b) In the prosecution of any person as officer, director, or agent, it shall be sufficient to allege and prove the unlawful intent of the person, firm, or corporation for whom or which he or she acts.

**History.** Acts 1937, No. 253, § 2; Pope's Dig., § 14312; A.S.A. 1947, § 70-302.

### **4-75-211. Remedies — Witnesses and documents — Immunity.**

(a) Any person, firm, private corporation, or municipal or other public corporation, or trade association, may maintain an action to enjoin a continuance of any act or acts in violation of this subchapter and, if injured thereby, for the recovery of damages.

(b)(1) If, in such action, the court shall find that the defendant is violating or has violated any of the provisions of this subchapter, it shall enjoin the defendant from a continuance thereof.

(2) It shall not be necessary that actual damages to the plaintiff be alleged or proved.

(3) In addition to injunctive relief, the plaintiff in the action shall be entitled to recover from the defendant three (3) times the amount of the actual damages, if any, sustained.

(c)(1) Any defendant in an action brought under the provisions of this section or any witness desired by the state may be required to testify under the provisions of §§ 16-43-211 and 16-43-701.

(2) In addition, the books and records of any such defendant may be brought into court and introduced, by reference, into evidence.

(3) However, no information so obtained may be used against the defendant as a basis for a misdemeanor prosecution under the provisions of §§ 4-75-204 and 4-75-207 — 4-75-210.

(d) The remedies prescribed in this subchapter are cumulative and in addition to the remedies prescribed in the Public Utilities Act, § 23-1-101 et seq., for discrimination by public utilities. If any conflict

shall arise between this subchapter and the Public Utilities Act, § 23-1-101 et seq., the latter shall prevail.

**History.** Acts 1937, No. 253, §§ 10, 12; Pope's Dig., §§ 14320, 14322; A.S.A. 1947, §§ 70-310, 70-312.

### CASE NOTES

#### **Statute of Limitations.**

This subchapter contains no limitation period, which results in the application of the general catch-all five year statute

found in § 16-56-115. *Jackson v. Swift-Eckrich*, 830 F. Supp. 486 (W.D. Ark. 1993).

### **4-75-212. Civil actions and settlements by the Attorney General.**

(a) In addition to the other remedies provided in this subchapter, whenever the Attorney General has reason to believe that any person is engaging, has engaged, or is about to engage in any act or practice declared unlawful by this subchapter, the Attorney General may bring an action in the name of the state against that person:

(1) To obtain a declaratory judgment that the act or practice violates the provisions of this subchapter;

(2) To enjoin any act or practice that violates the provisions of this subchapter by issuance of a temporary restraining order or preliminary or permanent injunction, without bond, upon the giving of appropriate notice;

(3) To recover on behalf of the state and its agencies actual damages or restitution for loss incurred either directly or indirectly; and

(4) To recover civil penalties of up to one thousand dollars (\$1,000) per violation of this subchapter, or any injunction, judgment or consent order issued or entered into under the provisions of this subchapter and reasonable expenses, investigative costs, and attorney's fees.

(b) The Attorney General may also bring a civil action in the name of the state, as *parens patriae* on behalf of natural persons residing in this state, to secure monetary relief as provided under this section for injury, directly or indirectly sustained by those persons because of any violation of this subchapter, in accordance with the following provisions:

(1)(A) The circuit court shall award the Attorney General as monetary relief actual damages sustained or restitution for loss incurred as a result of the violations of this subchapter, and the cost of suit, including a reasonable attorney's fee.

(B) The court shall exclude from the amount of monetary relief awarded in the action any amount which duplicates amounts that have been awarded for the same injury already or which are allocable to persons who have excluded their claims under subdivision (b)(3)(A) of this section.

(C) The treble damages recoverable under § 4-75-211(b)(3) are not recoverable under a *parens patriae* action brought under this section.

(2)(A) In any action brought under this section, the Attorney General shall, at the time, in the manner, and with the content as the court

may direct, cause notice of the *parens patriae* action to be given by publication.

(B) If the court finds that notice given solely by publication would deny due process of law to any person, the court shall direct the Attorney General to give the notice as may be required by due process of law.

(3)(A) Any person on whose behalf an action is brought under this section may elect to exclude from the adjudication the portion of the Attorney General's claim for monetary relief attributable to him or her by filing notice of the election with the court, within the time period specified in the notice of the action given to the persons to be benefited by the action.

(B) Any person failing to give the notice shall be barred during the pendency of the action from commencing an action in his or her own name for the injury alleged in the action and the final judgment in the action shall be *res judicata* as to any claim which could be brought by the person under this act based on the facts alleged or proven in the action.

(C)(i) The provisions of §§ 4-75-212 — 4-75-216 of this subchapter shall apply only to actions instituted by the Attorney General.

(ii) Nothing contained in the provisions set forth in §§ 4-75-212 — 4-75-216 should be deemed to expand the rights or remedies available to persons proceeding under any action instituted by one (1) or more persons or an entity other than the Attorney General, for violations of the provisions of this subchapter.

(4) All damages shall be distributed in a manner that will afford each person a reasonable opportunity to secure his or her appropriate portion of the net monetary relief, including a distribution under the theory of *cy pres*, subject to approval by the court.

(c)(1) In lieu of instigating or continuing an action or proceeding, or to conclude an investigation commenced or contemplated under this subchapter, the Attorney General may accept a consent decree with respect to any act or practice alleged to be a violation of this subchapter.

(2) The consent decree may include a stipulation for the payment of civil penalties, the Attorney General's reasonable expenses, investigative costs and attorney's fees, an agreement to pay damages or to allow for restitution of money, property, or other things received in connection with a violation of this act, and agreed to injunctive provisions.

(3) Before any consent decree entered into under this section is effective, it must be approved by the circuit court, the federal district court, or if an action has already been commenced, the court in which the action is pending and an entry made in that court in the manner required for making an entry of judgment.

(4)(A) If the consent decree submitted to the court is to settle an action brought under subsection (b) of this section, notice of the proposed settlement shall be given in the manner as the court directs.

(B) Once court approval is received, any breach of the conditions of the consent decree shall be treated as a violation of a court order, and

shall be subject to all penalties provided by law for violation of court orders.

(d) In addition to actions under state law, the Attorney General may proceed under any antitrust laws in the federal courts on behalf of this state or any of its agencies, or as *parens patriae* on behalf of natural persons in this state.

**History.** Acts 2003, No. 1172, § 1. 1172, codified as §§ 4-75-212 — 4-75-217,  
**Meaning of “this act”.** Acts 2003, No. 4-75-315 — 4-75-320.

### RESEARCH REFERENCES

**U. Ark. Little Rock L. Rev.** Survey of sembly, Business Law, 26 U. Ark. Little  
 Legislation, 2003 Arkansas General As- Rock L. Rev. 351.

#### 4-75-213. Person defined.

Unless otherwise defined, for purposes of this subchapter, “person” means any natural person, corporation, firm, partnership, limited partnership, trust, association, or any other legal or commercial entity.

**History.** Acts 2003, No. 1172, § 1.

#### 4-75-214. Awards to the Attorney General — Use of moneys.

(a) There shall be established within the office of the Attorney General an Antitrust Enforcement Account into which all costs and fees recovered by the Attorney General under the terms of this subchapter or the federal antitrust laws shall be remitted.

(b) The costs and fees deposited into the account shall be used for the furtherance of the Attorney General’s duties and activities under this subchapter.

**History.** Acts 2003, No. 1172, § 1. torney General and use of moneys, § 4-75-  
**Cross References.** Awards to the At- 317.

#### 4-75-215. Action not barred because it affects interstate or foreign commerce.

(a) This subchapter is to apply to any economic activity occurring wholly or partly within the State of Arkansas, or which affects economic activity within the State of Arkansas.

(b) No action instituted by the Attorney General under this subchapter shall be barred on the ground that the activity or conduct complained of in any way affects or involves interstate or foreign commerce.

**History.** Acts 2003, No. 1172, § 1.

**4-75-216. Venue.**

Any action, application, or motion brought by the Attorney General against a person under this subchapter shall be filed in Pulaski County Circuit Court unless the action, application, or motion is brought as part of an action containing claims of federal law violations, in which event the action shall be brought in the appropriate federal court.

**History.** Acts 2003, No. 1172, § 1.

**4-75-217. Statute of limitations.**

(a) Any action brought by the Attorney General pursuant to this subchapter is barred if it is not commenced within five (5) years after the cause of action accrues.

(b) The statute of limitations described in subsection (a) of this section shall be tolled during any period when the defendant in any action fraudulently concealed the events upon which the cause of action is based.

(c) This section is not intended to allow for the commencement of any action by the Attorney General under the provisions of this subchapter for events occurring prior to the enactment of this section of which the Attorney General had actual knowledge.

**History.** Acts 2003, No. 1172, § 1.

**SUBCHAPTER 3 — MONOPOLIES GENERALLY****SECTION.**

4-75-301. Definition.

4-75-302. Monopolies unlawful.

4-75-303. Lawful commerce excepted.

4-75-304 — 4-75-307. [Repealed.]

4-75-308. Precedence of actions under subchapter.

4-75-309. Fixing prices or quantities of products.

4-75-310. Driving out or financially injuring competition.

4-75-311, 4-75-312. [Repealed.]

**SECTION.**

4-75-313, 4-75-314. [Repealed.]

4-75-315. Civil actions and settlements by the Attorney General.

4-75-316. Person defined.

4-75-317. Awards to the Attorney General — Use of moneys.

4-75-318. Action not barred because it affects interstate or foreign commerce.

4-75-319. Venue.

4-75-320. Statute of limitations.

**Effective Dates.** Acts 1905, No. 1, § 12: effective 60 days after passage.

Acts 2003, No. 1172, § 5: Apr. 8, 2003. Emergency clause provided: "It is found and determined by the Eighty-fourth General Assembly that without the amendments herein, the Attorney General is unable to adequately protect the interests of the consumers of the State of Arkansas under the provisions of the Unfair Trade Practices Act and the chapter on Monopo-

lies Generally for harm they have suffered as indirect purchasers. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by

the Governor and the veto is overridden, the date the last house overrides the veto.”

## RESEARCH REFERENCES

**ALR.** Time when cause of action accrues for civil action under state antitrust, monopoly, or restraint or trade statutes. 90 A.L.R.4th 1102.

**Am. Jur.** 54A Am. Jur. 2d, Monop., § 781 et seq.

**Ark. L. Rev.** Contracts in Restraint of Trade, Employee Covenants Not to Compete, 21 Ark. L. Rev. 214.

**C.J.S.** 58 C.J.S., Monop., § 56 et seq.

## CASE NOTES

### ANALYSIS

Constitutionality.

Nature of Action.

Pleading.

Production of Documents.

Surrender of Articles of Incorporation.

### Constitutionality.

Section 4-75-314 [repealed] contemplates no more than that defendant shall make an honest effort to produce the testimony and is valid. *Hammond Packing Co. v. State*, 81 Ark. 519, 100 S.W. 407 (1907), *aff'd*, *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 29 S. Ct. 370, 53 L. Ed. 530 (1909); *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 29 S. Ct. 370, 53 L. Ed. 530 (1909).

### Nature of Action.

The action under § 4-75-304 [repealed] is not a criminal proceeding within Ark. Const., Art. 2, § 8 requiring indictment by grand jury. *Hammond Packing Co. v. State*, 81 Ark. 519, 100 S.W. 407 (1907), *aff'd*, *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 29 S. Ct. 370, 53 L. Ed. 530 (1909); *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 29 S. Ct. 370, 53 L. Ed. 530 (1909).

### Pleading.

Defendant pleading act in bar to enforce forfeiture must state every fact necessary to show that he is entitled to it. *Frank A. Menne Factory v. Harback Bros.*, 85 Ark. 278, 107 S.W. 991 (1908).

### Production of Documents.

The state, in a proper action, may require of either a foreign or domestic corporation doing business under authority of its laws the production of books, papers and documents in order that it may be determined whether the corporation is violating the antitrust act, provided the order is reasonable in its terms. *Hammond Packing Co. v. State*, 81 Ark. 519, 100 S.W. 407 (1907), *aff'd*, *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 29 S. Ct. 370, 53 L. Ed. 530 (1909); *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 29 S. Ct. 370, 53 L. Ed. 530 (1909).

### Surrender of Articles of Incorporation.

An action against a corporation to recover penalties for alleged violation of antitrust statutes will be abated when the corporation, during the pendency of the action, surrenders its charter (now articles of incorporation). *State ex rel. Moose v. Arkansas Cotton Oil Co.*, 116 Ark. 74, 171 S.W. 1192 (1914).

## 4-75-301. Definition.

As used in this subchapter, unless the context otherwise requires, “monopoly” means any union or combination or consolidation or affiliation of capital, credit, property, assets, trade, customs, skill, or acts of any other valuable thing or possession, by or between persons, firms, or corporations, or association of persons, firms, or corporations, whereby

any one (1) of the purposes or objects mentioned in this subchapter is accomplished or sought to be accomplished, or whereby any one (1) or more of the purposes are promoted or attempted to be executed or carried out, or whereby the several results described herein are reasonably calculated to be produced. A monopoly, as thus defined and contemplated, includes not merely a combination by and between two (2) or more persons, firms, and corporations, acting for themselves, but is especially defined and intended to include all aggregations, amalgamations, affiliations, consolidations, or incorporations of capital, skill, credit, assets, property, custom, trade, or other valuable things or possessions, whether effected by the ordinary methods of partnership or by actual union under the legal form of a corporation or any incorporated body resulting from the union of one (1) or more distinct firms or corporations, or by the purchase, acquisition, or control of shares or certificates of stock or bonds or other corporate property or franchises; and all partnerships and corporations that have been or may be created by the consolidation or amalgamation of the separate capital, stock, bonds, assets, credit, property, customs, trade, corporate, or firm belongings of two (2) or more firms or corporations or companies are especially declared to constitute monopolies within the meaning of this subchapter, if so created or entered into for any one (1) or more of the purposes named in this subchapter.

**History.** Acts 1905, No. 1, § 5, p. 1; C. & M. Dig., § 7373; Pope's Dig., § 9412; A.S.A. 1947, § 70-105.

#### CASE NOTES

**Cited:** *Elizabeth Hosp. v. Richardson*, 167 F. Supp. 155 (W.D. Ark. 1958).

#### 4-75-302. Monopolies unlawful.

A monopoly, as defined in § 4-75-301, is declared to be unlawful and against public policy, and any and all persons, firms, corporations, or association of persons engaged therein shall be deemed and adjudged to be guilty of a conspiracy to defraud and shall be subject to the penalties prescribed in this subchapter.

**History.** Acts 1905, No. 1, § 5, p. 1; C. & M. Dig., § 7373; Pope's Dig., § 9412; A.S.A. 1947, § 70-105.

#### CASE NOTES

**Cited:** *Elizabeth Hosp. v. Richardson*, 167 F. Supp. 155 (W.D. Ark. 1958).

#### 4-75-303. Lawful commerce excepted.

The purchase, sale, delivery, or disposition of any article of commerce in a lawful manner within this state shall not be deemed an act done in pursuance of, or for the purpose of carrying into effect, any conspiracy prohibited by this subchapter.

**History.** Acts 1905, No. 1, § 4, p. 1; Pope's Dig., § 9411; A.S.A. 1947, § 70-1913, No. 161, § 1; C. & M. Dig., § 7372; 104.

#### 4-75-304 — 4-75-307. [Repealed.]

**Publisher's Notes.** These sections, concerning monetary penalties, disposition of funds, forfeiture of corporate rights for violations, overt act necessary to incur penalty, enforcement by Attorney General, and compensation, were repealed by Acts 2003, No. 1172, § 3. The sections were derived from:

4-75-304. Acts 1905, No. 1, § 2, p. 1; 1913, No. 161, § 1; C. & M. Dig., § 7370; Pope's Dig., § 9409; A.S.A. 1947, § 70-102.

4-75-305. Acts 1905, No. 1, §§ 3, 11, p. 1; 1913, No. 161, § 1; C. & M. Dig., §§ 7371, 7379; Pope's Dig., §§ 9410, 9418; A.S.A. 1947, §§ 70-103, 70-111.

4-75-306. Acts 1905, No. 1, § 4, p. 1; 1913, No. 161, § 1; C. & M. Dig., § 7372; Pope's Dig., § 9411; A.S.A. 1947, § 70-104.

4-75-307. Acts 1905, No. 1, § 10, p. 1; 1913, No. 161, § 1; C. & M. Dig., § 7378; Pope's Dig., § 9417; A.S.A. 1947, § 70-110.

#### 4-75-308. Precedence of actions under subchapter.

All actions authorized and brought under this subchapter shall have precedence on motion of the Attorney General, of all other business, civil and criminal, except criminal cases where the defendants are in jail.

**History.** Acts 1905, No. 1, § 11, p. 1; Pope's Dig., § 9418; A.S.A. 1947, § 70-1913, No. 161, § 1; C. & M. Dig., § 7379; 111.

#### 4-75-309. Fixing prices or quantities of products.

Any corporation organized under the laws of this or any other state or country and transacting or conducting any kind of business in this state, or any partnership or individual, or other association or persons whatsoever, who is, or creates, enters into, or becomes a member of, or a party to, any pool, trust, agreement, combination, confederation, or understanding, whether it is made in this state or elsewhere, with any other corporation, partnership, individual, or any other person or association of persons, to regulate or fix, either in this state or elsewhere, the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning, or tornado, or to maintain the price when so regulated or fixed, or who is, or enters into, or becomes a member of, or a party to any pool, agreement, contract, combination, association, or confederation, whether made in this state or elsewhere, to fix or limit in this state or elsewhere, the

amount or quantity of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning, storm, cyclone, or tornado or any other kind of policy issued by any corporation, partnership, individual, or association of persons aforesaid, shall be deemed and adjudged guilty of a conspiracy to defraud and be subject to the penalties as provided by this subchapter.

**History.** Acts 1905, No. 1, § 1, p. 1; C. & M. Dig., § 7368; Pope's Dig., § 9407; A.S.A. 1947, § 70-101.

**Cross References.** Agricultural cooperative associations exempt, § 2-2-122.

Cooperative marketing association, exempt, § 2-2-426.

Oil and gas, agreements for production not in violation of law, §§ 15-72-301, 15-72-504.

## CASE NOTES

### ANALYSIS

Constitutionality.

Applicability.

Collusive Bidding.

Competition.

Criminal Conspiracy.

Fixing Rates Outside State.

Pleading.

Validity of Contract.

### Constitutionality.

Legislature could constitutionally provide that foreign insurance companies should not do business within state if they were members of any pool, trust or combination which would affect insurance rates anywhere. *Hartford Fire Ins. Co. v. State*, 76 Ark. 303, 89 S.W. 42 (1905).

### Applicability.

This subchapter prohibits any foreign or domestic corporation, partnership or individual from doing business in the state while a member of a pool, trust or combination, whether made in this state or elsewhere to fix or regulate in this state or elsewhere, the price of any article. *Hartford Fire Ins. Co. v. State*, 76 Ark. 303, 89 S.W. 42 (1905); *Frank A. Menne Factory v. Harback Bros.*, 85 Ark. 278, 107 S.W. 991 (1908).

This section does not apply to combinations among railroad companies to fix passenger and freight rates. *State ex rel. Means v. Chicago, R.I. & P. Ry.*, 95 Ark. 114, 128 S.W. 555 (1910).

An agreement to fix the price of laundering is not prohibited by this subchap-

ter. *State ex rel. Moose v. Frank*, 114 Ark. 47, 169 S.W. 333 (1914).

### Collusive Bidding.

A citizen and taxpayer may bring an action to compel an accounting for moneys alleged to have been illegally paid to corporations charged with collusive bidding on public contracts and with furnishing material of a grade inferior to that purchased. *Nelson v. Berry Petroleum Co.*, 242 Ark. 273, 413 S.W.2d 46 (1967).

### Competition.

Contract which gave supplier of natural gas power to fix rate for gas charged by distributor was not in violation of this section when there was no competition in the sale of such gas. *Ft. Smith Light & Traction Co. v. Kelley*, 94 Ark. 461, 127 S.W. 975 (1910).

### Criminal Conspiracy.

The offense defined by this act does not constitute the common law crime of criminal conspiracy. *Hammond Packing Co. v. State*, 81 Ark. 519, 100 S.W. 407 (1907), *aff'd*, *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 29 S. Ct. 370, 53 L. Ed. 530 (1909).

### Fixing Rates Outside State.

A foreign insurance corporation is prohibited from doing business in Arkansas while a member of a pool, trust, or combination to fix fire insurance rates anywhere, although such pool, trust or combination was not created or maintained in Arkansas and did not attempt to fix prices in this state. *Hartford Fire Ins. Co. v. State*, 76 Ark. 303, 89 S.W. 42 (1905).

**Pleading.**

Complaint did not charge a violation of this section where no allegations were made tending to show the creation of a monopoly or any attempt or intention to fix or regulate prices. *Elizabeth Hosp. v. Richardson*, 167 F. Supp. 155 (W.D. Ark. 1958), *aff'd*, *Elizabeth Hospital, Inc. v. Richardson*, 269 F.2d 167 (8th Cir. 1959).

**Validity of Contract.**

Where contract is severable, fact that it contains provisions in violation of this section will not avoid whole contract. *Ft. Smith Light & Traction Co. v. Kelley*, 94 Ark. 461, 127 S.W. 975 (1910).

**Cited:** *Midland Valley R.R. v. Hoffman Coal Co.*, 91 Ark. 180, 120 S.W. 380 (1909).

**4-75-310. Driving out or financially injuring competition.**

If any person, company, partnership, association, corporation, or agent engaged in the manufacture or sale of any article of commerce or consumption produced, manufactured, or mined in this state or elsewhere shall, with the intent and purpose of driving out competition or for the purpose of financially injuring competitors, sell within this state at less than cost of manufacture or production or sell in such a way, or give away, in this state their productions for the purpose of driving out competition or financially injuring competitors engaged in similar business, then the person, or persons, company, partnership, association, corporation, or agent resorting to this method of securing a monopoly within this state in such business shall be deemed guilty of a conspiracy to form or secure a trust or monopoly in restraint of trade and on conviction shall be subjected to the penalties of this subchapter.

**History.** Acts 1905, No. 1, § 6, p. 1; C. & M. Dig., § 7374; Pope's Dig., § 9413; A.S.A. 1947, § 70-106.

**4-75-311, 4-75-312. [Repealed.]**

**Publisher's Notes.** These sections, concerning an affidavit of nonparticipation in monopolies, letter of inquiry, and penalties for noncompliance, were repealed by Acts 1997, No. 898, §§ 1, 2. They were derived from the following sources:

4-75-311. Acts 1905, No. 1, § 7, p. 1;

1913, No. 161, § 1; C. & M. Dig., § 7375; Pope's Dig., § 9414; A.S.A. 1947, § 70-107.

4-75-312. Acts 1905, No. 1, § 7, p. 1; 1913, No. 161, § 1; C. & M. Dig., § 7375; Pope's Dig., § 9414; A.S.A. 1947, § 70-107.

**4-75-313, 4-75-314. [Repealed.]**

**Publisher's Notes.** These sections, concerning proceedings to dissolve or restrain monopolies or to recover penalties, depositions and production of documents, and judgment by default upon failure to testify, were repealed by Acts 2003, No. 1172, § 4. The sections were derived from:

4-75-313. Acts 1905, No. 1, § 8, p. 1;

1913, No. 161, § 1; C. & M. Dig., § 7376; Pope's Dig., § 9415; A.S.A. 1947, § 70-108.

4-75-314. Acts 1905, No. 1, § 9, p. 1; 1913, No. 161, § 1; C. & M. Dig., § 7377; Pope's Dig., § 9416; A.S.A. 1947, § 70-109.

**4-75-315. Civil actions and settlements by the Attorney General.**

(a) In addition to the other remedies provided in this subchapter, whenever the Attorney General has reason to believe that any person is engaging, has engaged, or is about to engage in any act or practice declared unlawful by this subchapter, the Attorney General may bring an action in the name of the state against that person:

(1) To obtain a declaratory judgment that the act or practice violates the provisions of this subchapter;

(2) To enjoin any act or practice that violates the provisions of this subchapter by issuance of a temporary restraining order or preliminary or permanent injunction, without bond, upon the giving of appropriate notice;

(3) To recover on behalf of the state and its agencies actual damages or restitution for loss incurred either directly or indirectly; and

(4) To recover civil penalties of up to one thousand dollars (\$1,000) per violation of this subchapter, or any injunction, judgment, or consent order issued or entered into under the provisions of this subchapter and reasonable expenses, investigative costs, and attorney's fees.

(b) The Attorney General also may bring a civil action in the name of the state, as *parens patriae* on behalf of natural persons residing in this state, to secure monetary relief as provided under this section for injury, directly or indirectly sustained by those persons because of any violation of this subchapter, in accordance with the following provisions:

(1) The court in which the action is commenced shall award the Attorney General as monetary relief the actual damages sustained or restitution for loss incurred as a result of the violations of this subchapter and the cost of suit, including a reasonable attorney's fee. The court shall exclude from the amount of monetary relief awarded in the action any amount which duplicates amounts that have been awarded for the same injury already or which are allocable to persons who have excluded their claims under subdivision (b)(3)(A) of this section.

(2)(A) In any action brought under this section, the Attorney General shall, at the time, in the manner, and with the content as the circuit court may direct, cause notice of the *parens patriae* action to be given by publication.

(B) If the court finds that notice given solely by publication would deny due process of law to any person, the court shall direct the Attorney General to give the notice as may be required by due process of law.

(3)(A) Any person on whose behalf an action is brought under this section may elect to exclude from the adjudication the portion of the Attorney General's claim for monetary relief attributable to him or her by filing notice of the election with the court, within the time period specified, in the notice of the action given to the persons to be benefited by the action.

(B) Any person failing to give the notice shall be barred during the pendency of the action from commencing an action in his or her own

name for the injury alleged in the action and the final judgment in the action shall be res judicata as to any claim which could be brought by the person under this subchapter based on the facts alleged or proven in the action.

(C)(i) The provisions set forth in this section and in §§ 4-75-316 — 4-75-319 shall apply only to actions instituted by the Attorney General.

(ii) Nothing in the provisions set forth in this section and in §§ 4-75-316 — 4-75-319 shall be deemed to expand or create additional rights or remedies available to persons proceeding under any action instituted by one (1) or more persons or an entity other than the Attorney General for violations of the provisions of this subchapter.

(4) All damages shall be distributed in a manner that will afford each person a reasonable opportunity to secure his or her appropriate portion of the net monetary relief, including a distribution under the theory of cy pres, subject to approval by the court.

(c)(1) In lieu of instigating or continuing an action or proceeding, or to conclude an investigation commenced or contemplated by this subchapter, the Attorney General may accept a consent decree with respect to any act or practice alleged to be a violation of this subchapter.

(2) The consent decree may include a stipulation for the payment of civil penalties, the Attorney General's reasonable expenses, investigative costs and attorney's fees, an agreement to pay damages or to allow for restitution of money, property, or other things received in connection with a violation of this act, and agreed to injunctive provisions.

(3) Before any consent decree entered into under this section is effective, it must be approved by the circuit court, the federal district court, or if an action has already been commenced, the court in which the action is pending and an entry made in that court in the manner required for making an entry of judgment.

(4) If the consent decree submitted to the court is to settle an action brought under subsection (b) of this section, notice of the proposed settlement shall be given in the manner as the court directs.

(5) Once court approval is received, any breach of the conditions of the consent decree shall be treated as a violation of a court order, and shall be subject to all penalties provided by law for violation of court orders.

(d) In addition to actions under state law, the Attorney General may proceed under any antitrust laws in the federal courts on behalf of this state or any of its agencies, or as *parens patriae* on behalf of natural persons in this state.

**History.** Acts 2003, No. 1172, § 2.

1172, codified as §§ 4-75-212 — 4-75-217,

**Meaning of "this act".** Acts 2003, No.

4-75-315 — 4-75-320.

**RESEARCH REFERENCES**

**ALR.** Right of Retail Buyer of Price-Fixed Product to Sue Manufacturer on State Antitrust Claim. 35 A.L.R.6th 245.

**U. Ark. Little Rock L. Rev.** Survey of

Legislation, 2003 Arkansas General Assembly, Business Law, 26 U. Ark. Little Rock L. Rev. 351.

**4-75-316. Person defined.**

Unless otherwise defined, for purposes of this subchapter, “person” means any natural person, corporation, firm, partnership, limited partnership, trust, association, or any other legal or commercial entity.

**History.** Acts 2003, No. 1172, § 2.

**4-75-317. Awards to the Attorney General — Use of moneys.**

(a) There shall be established within the office of the Attorney General an Antitrust Enforcement Account into which all costs and fees recovered by the Attorney General under the terms of this subchapter or the federal antitrust laws shall be remitted.

(b) The costs and fees deposited into the account of the Attorney General’s Office shall be used for the furtherance of the Attorney General’s duties and activities under this subchapter.

**History.** Acts 2003, No. 1172, § 2.

**Cross References.** Awards to the At-

torney General and use of moneys, § 4-75-214.

**4-75-318. Action not barred because it affects interstate or foreign commerce.**

(a) This subchapter is to apply to any economic activity occurring wholly or partly within the State of Arkansas, or which affects economic activity within the State of Arkansas.

(b) No action instituted by the Attorney General under this subchapter shall be barred on the ground that the activity or conduct complained of in any way affects or involves interstate or foreign commerce.

**History.** Acts 2003, No. 1172, § 2.

**4-75-319. Venue.**

Any action, application, or motion brought by the Attorney General against a person under this subchapter shall be filed in the Pulaski County Circuit Court unless the action, application, or motion is brought as part of an action containing claims of federal law violations, in which event the action shall be brought in the appropriate federal court.

**History.** Acts 2003, No. 1172, § 2.

**4-75-320. Statute of limitations.**

- (a) Any action brought by the Attorney General pursuant to this subchapter is barred if it is not commenced within five (5) years after the cause of action accrues.
- (b) The foregoing statute of limitations shall be tolled during any period when the defendant in any action fraudulently conceals the events upon which the cause of action is based.
- (c) This section is not intended to allow for the commencement of any action by the Attorney General under the provisions of this subchapter for events occurring prior to the enactment of this section of which the Attorney General had actual knowledge.

**History.** Acts 2003, No. 1172, § 1.

**RESEARCH REFERENCES**

**ALR.** Right of Retail Buyer of Price-Fixed Product to Sue Manufacturer on State Antitrust Claim. 35 A.L.R.6th 245.

**SUBCHAPTER 4 — AUTOMOBILE DEALER’S ANTI-COERCION ACT**

SECTION.	SECTION.
4-75-401. Title.	4-75-409. Exclusive financing agreements — Threats as prima facie evidence.
4-75-402. Definitions.	4-75-410. Exclusive financing agreements — Threats presumed made at direction of manufacturer or distributor.
4-75-403. Subchapter cumulative.	4-75-411. Unlawful subsidies or discrimination.
4-75-404. Penalties — Persons subject to penalties.	4-75-412. Actions by injured parties.
4-75-405. Forfeiture of charter rights, etc., and dissolution for violations — Proceedings.	4-75-413. Arbitration and forum selection clauses in the sale of motor vehicles.
4-75-406. Foreign corporations violating subchapter prohibited from doing business.	
4-75-407. Contracts violating subchapter void.	
4-75-408. Exclusive financing agreements — Prohibition.	

**Effective Dates.** Acts 1937, No. 205, § 16: effective on passage.

**4-75-401. Title.**

This subchapter shall be known and shall be cited as the “Automobile Dealer’s Anti-Coercion Act”.

**History.** Acts 1937, No. 205, § 14; Pope's Dig., § 9432; A.S.A. 1947, § 70-143.

#### **4-75-402. Definitions.**

As used in this subchapter, unless the context otherwise requires:

- (1) "Person" means any individual, firm, corporation, partnership, association, trustee, receiver, or assignee for the benefit of creditors;
- (2) "Sell", "sold", "buy", and "purchase" include exchange, barter, gift, and offer of contract to sell or buy; and
- (3) "Wholesale distribution" means the sale or distribution of motor vehicles, or any interest therein, by the manufacturer thereof or by any person, directly or indirectly owned by the manufacturer.

**History.** Acts 1937, No. 205, § 13; Pope's Dig., § 9431; A.S.A. 1947, § 70-142.

#### **4-75-403. Subchapter cumulative.**

The provisions of this subchapter shall be held cumulative to each other and all other laws of this state in force as of June 10, 1937, in any way affecting them.

**History.** Acts 1937, No. 205, § 11; Pope's Dig., § 9429; A.S.A. 1947, § 70-140.

#### **4-75-404. Penalties — Persons subject to penalties.**

(a) Any person shall be guilty of a Class B misdemeanor if the person:

- (1) Shall violate any of the provisions of this subchapter;
- (2) Is a party to any agreement or understanding or to any contract prescribing any condition prohibited by this subchapter;
- (3) Is any employee, agent, or officer of any person that shall participate in any manner in making, executing, enforcing, performing, or in urging, aiding, or abetting in the performance of any such contract, condition, agreement, or understanding;
- (4) Shall pay or give or contract to pay or give any thing or service of value prohibited by this subchapter; and
- (5) Shall receive or accept or contract to receive or accept any thing or service of value prohibited by this subchapter.

(b) Each day's violation of this subchapter shall constitute a separate offense.

**History.** Acts 1937, No. 205, § 9; Pope's Dig., § 9427; A.S.A. 1947, § 70-138; Acts 2005, No. 1994, § 378.

**4-75-405. Forfeiture of charter rights, etc., and dissolution for violations — Proceedings.**

For a violation of any of the provisions of this subchapter by any corporation or association mentioned in this subchapter, it shall be the duty of the Attorney General or the prosecuting attorney of the proper county to institute proper suits or quo warranto proceedings in any court of competent jurisdiction for the forfeiture of its charter rights, franchises, or privileges and powers exercised by the corporation or association, and for the dissolution of the corporation or association under the general statutes of this state.

**History.** Acts 1937, No. 205, § 7; Pope's Dig., § 9425; A.S.A. 1947, § 70-136.

**Cross References.** Proceedings for vacation of charter, § 16-118-105.

**4-75-406. Foreign corporations violating subchapter prohibited from doing business.**

Every foreign corporation, as well as every foreign association, exercising any of the powers, franchises, or functions of a corporation in this state, violating any of the provisions of this subchapter, is denied the right and prohibited from doing any business in this state. It shall be the duty of the Attorney General to enforce this provision by bringing proper proceedings by injunction or otherwise. The Secretary of State shall be authorized to revoke the license of any such corporation or association authorized by him or her to do business in this state.

**History.** Acts 1937, No. 205, § 8; Pope's Dig., § 9426; A.S.A. 1947, § 70-137.

**4-75-407. Contracts violating subchapter void.**

Any contract or agreement in violation of the provisions of this subchapter shall be absolutely void and shall not be enforceable either in law or equity.

**History.** Acts 1937, No. 205, § 10; Pope's Dig., § 9428; A.S.A. 1947, § 70-139.

**4-75-408. Exclusive financing agreements — Prohibition.**

It shall be unlawful for any person who is engaged, either directly or indirectly, in the manufacture or wholesale distribution of motor vehicles to sell, or enter into a contract to sell, motor vehicles to any person who is engaged or intends to engage in the business of selling such motor vehicles at retail in this state, on the condition or with an agreement or understanding, either express or implied, that the person so engaged in selling motor vehicles at retail shall in any manner finance the purchase or sale of any one (1) or number of motor vehicles only with or through a designated person or class of persons or shall sell and assign the conditional sales contract, chattel mortgages, or leases

arising from the sale of motor vehicles, or any one (1) or number thereof only to a designated person or class of persons, when the effect of the condition, agreement, or understanding so entered into may be to lessen or eliminate competition, or create or tend to create a monopoly in the person or class of persons who are designated, by virtue of the condition, agreement, or understanding to finance the purchase or sale of motor vehicles or to purchase such conditional sales contracts, chattel mortgages, or leases. Any such condition, agreement, or understanding is void and against the public policy of this state.

**History.** Acts 1937, No. 205, § 1; Pope's Dig., § 9419; A.S.A. 1947, § 70-130.

#### **4-75-409. Exclusive financing agreements — Threats as prima facie evidence.**

Any threat, expressed or implied, made to any person engaged in the business of selling motor vehicles at retail in this state by any person engaged, either directly or indirectly, in the manufacture or distribution of motor vehicles, that the person will discontinue or cease to sell, or refuse to enter into a contract to sell, or will terminate a contract to sell motor vehicles, to the person who is so engaged in the business of selling motor vehicles at retail, unless the person finances the purchase or sale of any one (1) or number of motor vehicles only with or through a designated person or class of persons or sells and assigns the conditional sales contracts, chattel mortgages, or leases arising from his or her retail sales of motor vehicles or any one (1) or number thereof only to a designated person or class of persons shall be prima facie evidence of the fact that such person so engaged in the manufacture or distribution of motor vehicles has sold or intends to sell them on the condition or with the agreement or understanding prohibited in § 4-75-408.

**History.** Acts 1937, No. 205, § 2; Pope's Dig., § 9420; A.S.A. 1947, § 70-131.

#### **4-75-410. Exclusive financing agreements — Threats presumed made at direction of manufacturer or distributor.**

Any threat, expressed or implied, made to any person engaged in the business of selling motor vehicles at retail in this state by any person, or any agent of any such person, who is engaged in the business of financing the purchase or sale of motor vehicles or of buying conditional sales contracts, chattel mortgages, or leases on motor vehicles in this state and is affiliated with or controlled by any person engaged, directly or indirectly, in the manufacture or distribution of motor vehicles, that the person so engaged in such manufacture or distribution shall terminate his or her contract with or cease to sell motor vehicles to such person engaged in the sale of motor vehicles at retail in this state unless such person finances the purchase or sale of any one (1) or number of

motor vehicles only with or through a designated person or class of persons or sells and assigns the conditional sales contracts, chattel mortgages, or leases arising from his or her retail sale of motor vehicles or any one (1) or any number thereof only to such person so engaged in financing the purchase or sale of motor vehicles or in buying conditional sales contracts, chattel mortgages, or leases on motor vehicles shall be presumed to be made at the direction of and with the authority of the person so engaged in the manufacture or distribution of motor vehicles, and shall be prima facie evidence of the fact that the person so engaged in the manufacture or distribution of motor vehicles has sold or intends to sell them on the condition or with the agreement or understanding prohibited in § 4-75-408.

**History.** Acts 1937, No. 205, § 3; Pope's Dig., § 9421; A.S.A. 1947, § 70-132.

#### **4-75-411. Unlawful subsidies or discrimination.**

(a) It shall be unlawful for any person who is engaged, directly or indirectly, in the manufacture or wholesale distribution of motor vehicles to pay or give or to contract to pay or give any subsidy to any person, other than an automobile dealer or automobile distributor, who is engaged in the business of financing the purchase or sale of motor vehicles or of buying conditional sales contracts, chattel mortgages, or leases on motor vehicles sold at retail within this state or to discriminate in favor of or against any person, other than an automobile dealer or automobile distributor engaged in the business of financing the purchase or sale of motor vehicles or of buying conditional sales contracts, chattel mortgages, or leases on motor vehicles sold at retail within this state, if the effect of any such subsidy or discrimination may be to lessen or eliminate competition or to create or tend to create a monopoly in the person or class of persons who receive the subsidy or who are benefited by the discrimination.

(b) It shall be unlawful for any person other than an automobile dealer or automobile distributor who is engaged in the business of financing the purchase or sale of motor vehicles or of buying conditional sales contracts, chattel mortgages, or leases on motor vehicles sold at retail within this state to accept or receive or contract or agree to accept or receive, either directly or indirectly, any subsidy or the benefit resulting from any discrimination as set forth in subsection (a) of this section from any person engaged, directly or indirectly, in the manufacture or wholesale distribution of motor vehicles if the effect of the acceptance or receipt of any such subsidy or benefit may be to lessen or eliminate competition or to create or tend to create a monopoly in the person or class of persons who receives the subsidy or who is benefited by the discrimination.

(c) It shall be unlawful for any person other than an automobile dealer or automobile distributor who accepts or receives, either directly or indirectly, any subsidy or the benefit resulting from any discrimina-

tion as set forth in subsection (b) of this section or contracts, either directly or indirectly, to receive any such subsidy or benefit to thereafter finance or attempt to finance the purchase or sale of any motor vehicles or buy or attempt to buy any conditional sales contracts, chattel mortgages, or leases on motor vehicles sold at retail in this state.

**History.** Acts 1937, No. 205, §§ 4-6; Pope's Dig., §§ 9422-9424; A.S.A. 1947, §§ 70-133 — 70-135.

#### **4-75-412. Actions by injured parties.**

(a) In addition to the criminal and civil penalties provided in this subchapter, any person who shall be injured in his or her business or property by any other person or corporation or association or partnership, by reason of anything forbidden or declared to be unlawful by this subchapter, may sue therefor in any court having jurisdiction thereof in the county where the defendant resides or is found, or any agent resides or is found, or where service may be obtained, without respect to the amount in controversy, and recover twofold the damages by him or her sustained and the costs of suit.

(b) Whenever it shall appear to the court before which any proceedings under this subchapter may be pending that the ends of justice require that other parties shall be brought before the court, the court may cause them to be made parties defendant and summoned, whether they reside in the county where the action is pending or not.

**History.** Acts 1937, No. 205, § 12; Pope's Dig., § 9430; A.S.A. 1947, § 70-141.

#### **4-75-413. Arbitration and forum selection clauses in the sale of motor vehicles.**

(a) Except as provided in subsection (b) of this section, no new or used automobile dealer shall include in the contract for the sale of a motor vehicle a provision requiring the purchaser to submit a disputed matter to:

- (1) Binding arbitration; or
- (2) A forum outside the county in which the dealer resides or does business.

(b)(1)(A) The purchaser of a motor vehicle may knowingly and voluntarily agree to submit to binding arbitration only by signing a separate document entitled in bold print "Waiver of Purchaser's Right to Sue" containing a written waiver specifically acknowledging the purchaser's relinquishment of the right to have any dispute over the sale or operation of the motor vehicle decided by a court of law.

(B) The purchaser of a motor vehicle may knowingly and voluntarily agree to submit to a forum outside the dealer's residence or place of business only by signing a separate document entitled in bold print "Waiver of Purchaser's Choice of Forum" containing a written

waiver specifically acknowledging the purchaser's relinquishment of the right to have any dispute over the sale or operation of the motor vehicle decided by a court or arbitrator in the county in which the seller resides or does business.

(2) A waiver described in subdivision (b)(1)(A) or (B) of this section shall not be enforceable unless contained in a separate document.

(c) A purchaser who refuses to sign a waiver described in subsection (b) of this section shall not be denied the right to purchase a motor vehicle at the price agreed upon by the purchaser and the seller.

**History.** Acts 2005, No. 1239, § 1.

RESEARCH REFERENCES

**U. Ark. Little Rock L. Rev.** Survey of Legislation, 2005 Arkansas General Assembly, Business Law, 28 U. Ark. Little Rock L. Rev. 321.

SUBCHAPTER 5 — PRICE DISCRIMINATION

SECTION.	SECTION.
4-75-501. Manufactured products, coal oil, or dressed beef.	4-75-503. Furnishing or transmitting news.
4-75-502. Purchase of commodities.	

**Effective Dates.** Acts 1903, No. 183, § 5: effective on passage.  
Acts 1913, No. 51, § 5: approved Feb. 13, 1913. Emergency declared.  
Acts 1923, No. 616, § 4: approved Mar. 23, 1923. Emergency clause provided: "There being no adequate law in Arkansas to prevent unfair discrimination in the purchase of the commodities mentioned in

this act, and there being a necessity for the immediate protection of the people of Arkansas against such unfair discrimination, and this act being necessary for the immediate preservation of the public health, peace and safety, an emergency is hereby declared to exist, and this act shall take effect and be in force from and after its passage."

RESEARCH REFERENCES

**Am. Jur.** 54 Am. Jur. 2d, Trademarks, § 205 et seq.      **C.J.S.** 87 C.J.S., Trademarks, etc., § 382 et seq.

4-75-501. Manufactured products, coal oil, or dressed beef.

(a) It shall be unlawful for any person, company, corporation, or association engaged in the sale of any manufactured product, coal oil, or dressed beef, to:

(1) Sell any such manufactured product, coal oil, or dressed beef at a greater cash price at any place in this state, than the person, company, corporation, or association sells the manufactured product, coal oil, or dressed beef at other points in this state, after making due allowance for difference in cost of carriage or other necessary cost; or

(2) Willfully refuse or fail to allow to any person, corporation, or company making purchases of the manufactured product, coal oil, or dressed beef all rebates and discounts which are granted by them to other purchasers, for cash, of like quantities of the manufactured product, coal oil, or dressed beef.

(b)(1) Any person, company, corporation, or association violating any of the provisions of this section shall forfeit not less than two hundred dollars (\$200) nor more than one thousand dollars (\$1,000) for every such offense.

(2) Each unlawful sale or refusal or failure to allow the rebate or discount shall constitute a separate offense.

(c)(1) The penalty in cases pursuant to this section is to be recovered by an action in the name of the person, company, corporation, or association damaged by the greater price or refusal of, or failure to allow, the rebate or discount or in the name of the state at the relation of any prosecuting attorney in this state.

(2) The moneys thus collected shall be paid to the person, company, corporation, or association bringing the suit, and, when the suit is brought in the name of the state, the moneys collected shall be paid, one-fourth ( $\frac{1}{4}$ ) to the prosecuting attorney bringing the suit and three-fourths ( $\frac{3}{4}$ ) to the Public School Fund.

(3) Actions and suits under this section may be brought in any county in which the offense was committed by action at law or suit in equity in the circuit court.

(4) When the defendants are persons, companies, or associations, the service of summons upon the defendants in any county of this state shall be a sufficient service. Where the defendant is a corporation, the service of summons upon any agent of the corporation in this state shall be a lawful service.

(5) Several offenses under this section may be joined in one (1) action or suit.

**History.** Acts 1903, No. 183, §§ 1-3, p. 349; C. & M. Dig., §§ 10324g-10324i; Pope's Dig., §§ 14304-14306; A.S.A. 1947, §§ 70-120 — 70-122.

### CASE NOTES

#### Venue.

Contention that plaintiff was damaged because defendant charged a lower price in one county than elsewhere did not fix

the venue of action in that county. Concrete, Inc. v. Arkhola Sand & Gravel Co., 228 Ark. 1016, 311 S.W.2d 770 (1958).

### 4-75-502. Purchase of commodities.

(a) Any person, firm, company, association, or corporation, foreign or domestic, doing business in the State of Arkansas and engaged in the business of buying milk, cream, butter, butter fat, poultry, eggs, grain, or cottonseed who, for the purpose of destroying or injuring the business of a competitor, shall discriminate between different sections, localities, communities, cities, or towns of this state by purchasing the commodity

at a higher price or rate in one section, locality, community, city, or town than is paid for the same commodity by the person, firm, company, association, or corporation in another section, locality, community, city, or town, after making due allowance, if any, in the grade or quality of the commodity, and in the actual cost of transportation from the point of purchase to the point of manufacture, sale, or storage, shall be deemed guilty of unfair discrimination, which is prohibited and declared to be unlawful. However, the fact that any person, firm, company, association, or corporation purchases any of the above-mentioned commodities at a higher price or rate in the one section, locality, community, city, or town than is paid at the time for the same commodity by the same person, firm, company, association, or corporation in another section, locality, community, city, or town, after making due allowance for the difference, if any, in the grade or quality and in the actual cost of transportation from the point of purchase, sale, or storage, shall be prima facie evidence that the higher price or rate was paid for the purpose of destroying or injuring the business of a competitor and that the person, firm, company, association, or corporation is guilty of unfair discrimination.

(b) Any person, firm, company, association, or corporation who shall be convicted of unfair discrimination, as defined by this section, shall be fined for each offense not less than one thousand dollars (\$1,000) nor more than ten thousand dollars (\$10,000).

(c)(1) In addition thereto, any person, firm, company, association, or corporation so convicted shall be enjoined upon the application of the State of Arkansas or any person, firm, or corporation injured by the discrimination from engaging directly or indirectly in the business of purchasing in any such commodities.

(2) It is the duty of the Attorney General of the State of Arkansas, upon being informed that any person, firm, company, association, or corporation has been convicted of unfair discrimination as defined in this section, immediately to institute suit in the name of the State of Arkansas in any circuit court of this state where service may be had upon the defendant against the person, firm, company, association, or corporation to enjoin the person, firm, company, association, or corporation from engaging directly or indirectly in the business of buying any such commodities.

(3) Upon proof that any such person, firm, company, association, or corporation has been convicted of unfair discrimination, the court shall issue the injunction.

**History.** Acts 1923, No. 616, §§ 1-3; Pope's Dig., §§ 14308-14310; A.S.A. 1947, §§ 70-123 — 70-125.

**Cross References.** Jurisdiction of cir-

cuit courts, Ark. Const. Amend. 80, §§ 6, 19.

Sale of milk at less than cost prohibited, § 4-75-801 et seq.

**4-75-503. Furnishing or transmitting news.**

(a)(1)(A) All corporations, companies, individuals, associations, or persons associated for the purpose of furnishing news for publication in newspapers and engaged in furnishing news for publication shall furnish the service to all newspapers, persons, companies, or corporations authorized to do business under the laws of this state at uniform rates and without discrimination.

(B) The service shall be given in the same manner and at the same cost to all.

(2) No increase in the rate charged for such news service shall apply in this state unless the increased rates shall be made in conformity with the uniform increased rates made for all other points wherever the news service may be furnished by the persons, companies, corporations, associations, or companies associated.

(b)(1) Any person, association, company, or corporation associated violating the provisions of this section shall be guilty of a violation and fined in any sum not less than one thousand dollars (\$1,000) nor more than five thousand dollars (\$5,000).

(2) Each day's violation shall constitute a separate offense and shall be punished as such.

(c)(1) Any telegraph company or telephone company transmitting or permitting to be transmitted over its lines, by lease or otherwise, or which shall receive for transmission over any of its lines from any persons, companies, corporations, associations, or persons associated, any news item, the transmission of which is prohibited by this section, shall be guilty of a violation and punished by a fine of not less than five hundred dollars (\$500) nor more than five thousand dollars (\$5,000).

(2) The Attorney General or any prosecuting attorney of the state is empowered, authorized, and directed to bring suit in the name of the State of Arkansas for the recovery of the penalty prescribed by subdivision (c)(1) of this section.

(d) Any person, company, corporation, or any association of persons against whom a discrimination shall be made in the rate charged or of services rendered by any association, company, corporation, or persons associated in the furnishing of news service or to whom such news service is refused shall be entitled to recover damages in any sum not less than one thousand dollars (\$1,000) per day for each day of the discrimination or refusal.

**History.** Acts 1913, No. 51, §§ 1-4; C. & §§ 10358-10361; A.S.A. 1947, §§ 70-126 M. Dig., §§ 7965½-7968; Pope's Dig., — 70-129; Acts 2005, No. 1994, § 39.

**SUBCHAPTER 6 — THEFT OF TRADE SECRETS****SECTION.**

4-75-601. Definitions.

4-75-602. Effect of subchapter on other law.

4-75-603. Statute of limitations.

**SECTION.**

4-75-604. Injunctive relief.

4-75-605. Preservation of secrecy.

4-75-606. Damages.

4-75-607. Attorneys' fees.

**Publisher's Notes.** For Commentary regarding the Uniform Trade Secrets Acts, see Commentaries Volume A.

**Effective Dates.** Acts 1981, No. 439, § 8: Mar. 12, 1981. Emergency clause provided: "Because of the uncertainty with regard to a substantial number of patents and because of the commercial importance

of trade secrets law to industry in the State of Arkansas, it is necessary to have the doubtful and confused status of the common law and statutory remedies for trade secrets clarified and an emergency is therefore declared to exist so that this Act shall become effective immediately upon its approval."

## RESEARCH REFERENCES

**ALR.** Damages for misappropriation of trade secret. 11 A.L.R.4th 12.

Exemption of "trade secrets" from disclosure under state freedom of information act. 27 A.L.R.4th 773.

Disclosure or use of computer application software as misappropriation of trade secret. 30 A.L.R.4th 1250.

What is computer "trade secret" under state law. 53 A.L.R.4th 1046.

What is "trade secret" so as to render actionable under state law its use or disclosure by. 59 A.L.R.4th 641.

Discovery of trade secret in state court action. 75 A.L.R.4th 1009.

**Am. Jur.** 54A Am. Jur. 2d, Monop., § 1114 et seq.

**Ark. L. Notes.** Bozzo, Can You Keep a Secret? A primer on the Arkansas Trade Secrets Act, 1997 Ark. L. Notes 103.

**Ark. L. Rev.** Watkins, Access to Public Records under the Arkansas Freedom of Information Act, 38 Ark. L. Rev. 741.

Beckerman-Rodau, Are Ideas Within the Traditional Definition of Property?: A Jurisprudential Analysis, 47 Ark. L. Rev. 603.

**C.J.S.** 87 C.J.S., Trademarks, etc., §§ 128, 133.

**U. Ark. Little Rock L.J.** Commercial Torts—Trade Secrets—Arkansas Extends Trade Secret Protection to Customer Lists Under the Arkansas Trade Secrets Act. Allen v. Johar, Inc., 308 Ark. 45, 823 S.W.2d 824 (1992), 14 U. Ark. Little Rock L.J. 693.

Fifteenth Annual Survey of Arkansas Law, 15 U. Ark. Little Rock L.J. 427.

## CASE NOTES

### ANALYSIS

Construction.  
Purpose.

### Construction.

This subchapter must necessarily be read as attempting to prevent one from unfairly using a trade secret of another in an anti-competitive manner or disclosing it so that others could use it; thus, the "use" prong of the misappropriation definition requires that the use be for competitive reasons in order to give rise to a

cause of action under this subchapter. Southwestern Energy Co. v. Eickenhorst, 955 F. Supp. 1078 (W.D. Ark. 1997), aff'd, 175 F.3d 1025 (8th Cir. 1999).

### Purpose.

The aim of trade secrets law is to encourage businesses to invest resources in invention and discovering more efficient methods of production. Southwestern Energy Co. v. Eickenhorst, 955 F. Supp. 1078 (W.D. Ark. 1997), aff'd, 175 F.3d 1025 (8th Cir. 1999).

## 4-75-601. Definitions.

As used in this subchapter, unless the context otherwise requires:

(1) "Improper means" includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means;

(2) "Misappropriation" means:

(A) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or

(B) Disclosure or use of a trade secret of another without express or implied consent by a person who:

(i) Used improper means to acquire knowledge of the trade secret; or

(ii) At the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was:

(a) Derived from or through a person who had utilized improper means to acquire it;

(b) Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or

(c) Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or

(iii) Before a material change of his position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake;

(3) "Person" means a natural person, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or any other legal or commercial entity;

(4) "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

(A) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and

(B) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

**History.** Acts 1981, No. 439, § 1; A.S.A. 1947, § 70-1001.

## RESEARCH REFERENCES

**ALR.** Applicability of Inevitable Disclosure Doctrine Barring Employment of Competitor's Former Employee. 36 A.L.R.6th 537.

**Ark. L. Rev.** Carroll, Uniform Laws in Arkansas, 52 Ark. L. Rev. 313.

Cate, Saforo & Associates, Inc. v. Porocel Corp.: The Failure of the Uniform Trade Secrets Act to Clarify the Doubtful and Confused Status of Common Law

Trade Secret Principles, 53 Ark. L. Rev. 687.

**U. Ark. Little Rock L. Rev.** Annual Survey of Caselaw, Business Law, 24 U. Ark. Little Rock L. Rev. 883.

Note: Intellectual Property-Trade Secret Law-Is the Arkansas Supreme Court Following Other Jurisdictions Down the Wrong Road in Analyzing Combination Trade Secrets? Wal-Mart Stores v. P.O.

Mkt., 347 Ark. 651, 66 S.W.3d 620 (2002), 25 U. Ark. Little Rock L. Rev. 407.

Annual Survey of Caselaw, Intellectual Property, 25 U. Ark. Little Rock L. Rev. 1014, 1016.

## CASE NOTES

### ANALYSIS

In General.  
Applicability.  
Determinative Factors.  
Information Not Protected.  
Information Protected.  
Misappropriation.  
Readily Ascertainable.

### In General.

The distinction between information which is written down and that which is memorized has little materiality under Arkansas law; the critical issue is whether the information, whether written or memorized, is entitled to protection as a trade secret. *Vigoro Indus., Inc. v. Cleveland Chem. Co.*, 866 F. Supp. 1150 (E.D. Ark. 1994), *aff'd* in part, reversed in part, *Vigoro Indus., Inc. v. Crisp*, 82 F.3d 785 (8th Cir. 1996).

Cause of action for misappropriation of a trade secret accrued when the trade secrets were acquired; thus, the statute of limitations began to run in January 1999, when defendant started his new business with the knowledge of having worked at plaintiff's business and induced plaintiff's employees and customers to leave plaintiff's business. *Quality Optical of Jonesboro, Inc. v. Trusty Optical, L.L.C.*, 365 Ark. 106, 225 S.W.3d 369 (2006).

In a nursing care services provider's suit against a competing company, a damages award in favor of the provider was proper as the fair market value of the misappropriated trade secrets was an appropriate measure of unjust enrichment for purposes of the Arkansas Trade Secrets Act, §§ 4-75-601 — 4-75-607, and these trade secrets (the provider's computer program and databases) benefitted the competitor in its first-year's profits. The development and labor costs for the various lists and databases were properly calculated for unjust-enrichment damages as the competitor did not have to contribute to the time, effort, and cost of

their development. *R.K. Enters., LLC v. Pro-Comp Mgmt.*, 372 Ark. 199, 272 S.W.3d 85 (2008).

### Applicability.

Where invention or its components, together or singly, were either generally known by virtue of extant patents or readily ascertainable, by proper means contrary to the requirement of subdivision (4)(A), and where plaintiff further failed to demonstrate that it took reasonable, if any, efforts to maintain any secrecy on the subject matter as required by subdivision (4)(B), the evidence failed, as a matter of law, to prompt application of the Arkansas Trade Secrets Act. *Coenco, Inc. v. Coenco Sales, Inc.*, 940 F.2d 1176 (8th Cir. 1991).

Section 4-75-602 applied where plaintiff's tort claims of conversion and conspiracy stemmed from the same acts constituting a violation of the Arkansas Trade Secrets Act, § 4-75-601 *et seq.*; thus, the statutory language of the Act displaced or preempted the award of damages based upon plaintiff's tort claims for conversion of trade secrets, as well as other tort claims such as conspiracy, that might have arisen under a claim for misappropriation of trade secrets, and the trial court committed reversible error in its award of damages based on tort law, for tortious conversion and conspiracy. *R.K. Enter., L.L.C. v. Pro-Comp Mgmt.*, 356 Ark. 565, 158 S.W.3d 685 (2004).

Defendants were not entitled to a protective order because defendants' bald assertion that certain phone records constituted trade secrets under § 4-75-601(4) failed to satisfy defendants' burden to show that the records contained the type of sensitive information that would merit protection under Fed. R. Civ. P. 26(c)(7). *Rotoworks Int'l Ltd. v. Grassworks USA, LLC*, — F. Supp. 2d —, 2007 U.S. Dist. LEXIS 27097 (W.D. Ark. Apr. 11, 2007).

### Determinative Factors.

An important factor in determining whether a customer list was a trade secret

is whether the employer took actions to guard the secrecy or preserve the confidentiality of the list. Whether the customer information used was written down or memorized is immaterial. *Allen v. Johar, Inc.*, 308 Ark. 45, 823 S.W.2d 824 (1992).

In determining whether any particular information constitutes a trade secret, several statutory factors must be analyzed: first, it must be determined if the information has economic value from not being generally known; then, it must be determined whether the information was not generally known; next, it must be determined whether the information was "readily ascertainable by proper means"; and finally, the court must ascertain whether the information was subject to reasonable efforts to maintain its secrecy. *Vigoro Indus., Inc. v. Cleveland Chem. Co.*, 866 F. Supp. 1150 (E.D. Ark. 1994), *affd in part, reversed in part*, *Vigoro Indus., Inc. v. Crisp*, 82 F.3d 785 (8th Cir. 1996).

The issue of whether information constitutes a trade secret under the Arkansas Trade Secrets Act is governed by six factors: 1) the extent to which the information is known outside the business; 2) the extent to which the information is known by employees and others in the business; 3) the extent of measures taken to guard the secrecy of the information; 4) the value of the information to the party and competitors; 5) the amount of money or effort expended by the party in developing the information; and 6) the ease or difficulty with which the information could be properly acquired by others. *Wal-Mart Stores v. P.O. Mkt., Inc.*, 347 Ark. 651, 66 S.W.3d 620 (2002).

### Information Not Protected.

The following types of customer information, belonging to a farm products supplier, were not protectable as trade secrets under this subchapter: the fact that the farmer was a customer of the supplier; the farmer's history of crops planted, timing of planting, crop rotation schedule, and plans for future planting; the history of supplier's product sales to the farmer; the farmer's history of having his crop scouted for insects by supplier's salesmen; the farmer's history of having soil samples analyzed at supplier's expense; and the farmer's creditworthiness for farm-supply

purchases. *Vigoro Indus., Inc. v. Cleveland Chem. Co.*, 866 F. Supp. 1150 (E.D. Ark. 1994), *affd in part, reversed in part*, *Vigoro Indus., Inc. v. Crisp*, 82 F.3d 785 (8th Cir. 1996).

Identity of farm supply store customers was not entitled to trade secret protection because it could be easily discovered as they farmed in small geographic area; interested farmers would readily provide other types of information because that helped them purchase the most appropriate farm supplies. *Vigoro Indus., Inc. v. Crisp*, 82 F.3d 785 (8th Cir. 1996), *rehearing denied*, *Vigoro Indus. v. Cleveland Chem.*, — F.3d —, 1996 U.S. App. LEXIS 14845 (8th Cir. June 17, 1996).

Information at issue did not qualify as a trade secret where there were no efforts on the plaintiffs' part to restrain disclosure of information postemployment, such as with a noncompetition agreement. *Con-Agra Poultry Co. v. Tyson Foods, Inc.*, 342 Ark. 672, 30 S.W.3d 725 (2000).

A plan to have a separate company bill large bulk credit buyers' of retailer's goods and earn the credit markup of the cost of the retailer's goods was not a trade secret in that, even with looking at the combination of ideas instead of the ideas individually, the concept was not unique. *Wal-Mart Stores v. P.O. Mkt., Inc.*, 347 Ark. 651, 66 S.W.3d 620 (2002).

Employer's proprietary information was not a trade secret when it was either available on the internet or in hard copy or readily available to employees, and the secrecy of its software was compromised by frequently allowing access to it without the use of a password known only to the employer. *Weigh Sys. S., Inc. v. Mark's Scales & Equip., Inc.*, 347 Ark. 868, 68 S.W.3d 299 (2002).

Food corporation's nutrient profile was not a trade secret because hundreds of managers were educated about the profile and there was no proof that the corporation took any steps to swear them to secrecy or warn them of the confidential nature of the profile; relying on an ethical guide like the Corporate Code which failed to identify what was a trade secret, or to mention the nutrient profile, was not enough for the corporation to invoke trade-secret protection. *Tyson Foods, Inc. v. ConAgra, Inc.*, 349 Ark. 469, 79 S.W.3d 326 (2002).

Telephone records that defendants wanted to make subject to a Fed. R. Civ. P. 26(c)(7) protective order were not trade secrets as defined in § 4-75-601(4) because they were simply a list of customer telephone numbers, with the dates and times of various phone calls noted. The records did not contain any unique information about the customers that was difficult to ascertain. *Rotoworks Int'l Limited v. Grassworks USA, LLC*, — F. Supp. 2d —, 2007 U.S. Dist. LEXIS 30713 (W.D. Ark. App. 25, 2007).

### Information Protected.

Evidence clearly established that defendant's machines fit under the definition of trade secret. *Allen v. Johar, Inc.*, 308 Ark. 45, 823 S.W.2d 824 (1992).

This subchapter may, to a limited extent, be applied to prevent an attorney from breaching confidentiality agreements with a non-client in order to use information obtained from such agreements to establish a class action lawsuit against the non-client. *Southwestern Energy Co. v. Eickenhorst*, 955 F. Supp. 1078 (W.D. Ark. 1997), *aff'd*, 175 F.3d 1025 (8th Cir. 1999).

A trucking company's methods, processes, operations, marketing programs, computer programs, future plans, and customers, encompassed confidential information and were protected by the Trade Secrets Act. *Cardinal Freight Carriers, Inc. v. J.B. Hunt Transp. Servs., Inc.*, 336 Ark. 143, 987 S.W.2d 642 (1999).

A wash water system used in processing a raw material referred to as "Bayer Scale" constituted a trade secret where (1) although the system was a combination of components, each of which was in the public domain, the unified process afforded a competitive advantage, (2) the system was not generally known to either the plaintiff's or defendant's employees, (3) the plaintiff employed reasonable security measures to guard the configuration of the system, (4) the value of the system was its efficiency and inexpensive installation, (5) the engineer who designed the system spent some weeks on the problem solved by the system, and (6) no witness testified that he had ever seen Bayer Scale washed in a similar fashion. *Saforo & Assocs. v. Porocel Corp.*, 337 Ark. 553, 991 S.W.2d 117 (1999).

Where a former employer alleged that a former employee copied trade secrets and

solicited the former employer's clients to move their business to the current employer, and the former employer was granted a preliminary injunction based on nondisclosure and noncompetition provisions, although it would have been appropriate for the circuit court to enjoin the employee and the current employer under the Arkansas Trade Secrets Act also because the former employer's customer information came within the protection of the Act, this was a matter of discretion for the circuit court and the relief obtained would have been no broader. *Freeman v. Brown Hiller, Inc.*, 102 Ark. App. 76, 281 S.W.3d 749 (2008), rehearing denied, — Ark. App. —, — S.W.3d —, 2008 Ark. App. LEXIS 361 (May 7, 2008), review denied, — Ark. —, — S.W.3d —, 2008 Ark. LEXIS 584 (Sept. 4, 2008).

Jury could reasonably have concluded that a company division's customer, pricing, ongoing project, and profit information, which appeared in a new firm's business plan, met the necessary criteria of a trade secret, as the information possessed independent economic value from not being known to or readily ascertainable by a competitor, as shown by the testimony of those who financed the new business; the company's president testified that a competitor could "kill our entire company" with that type of information. *Bradshaw v. Alpha Packaging, Inc.*, 2010 Ark. App. 659, — S.W.3d — (2010).

### Misappropriation.

The test of whether the "improper acquisition" and "disclosure" aspects of the definition of misappropriation are met is inherently different from that of "use." *Southwestern Energy Co. v. Eickenhorst*, 955 F. Supp. 1078 (W.D. Ark. 1997), *aff'd*, 175 F.3d 1025 (8th Cir. 1999).

Use of a misappropriated trade secret gives rise to liability under subdivision (2)(B) of this section. *Pro-Comp Mgmt. v. R.K. Enters., LLC*, 366 Ark. 463, 237 S.W.3d 20 (2006).

Trial court properly determined that a company was liable for the misappropriation of trade secrets where it used the illegally obtained trade secrets and benefited from the appropriation. *Pro-Comp Mgmt. v. R.K. Enters., LLC*, 366 Ark. 463, 237 S.W.3d 20 (2006).

Defendants' motion to dismiss plaintiffs' claims for trade secret misappropriation

tion under this section, intentional interference with contractual relationships or business expectancies, fraud, unjust enrichment, and civil conspiracy was denied because there were fact issues as to whether plaintiffs' claims accrued within the applicable three-year statute of limitations set forth in § 4-75-603 and § 16-56-105 and whether the application of the doctrine of fraudulent concealment was appropriate, and further, plaintiffs' allegations were sufficient to withstand a motion to dismiss. *Roach Mfg. Corp. v. Northstar Indus.*, 630 F. Supp. 2d 1004 (E.D. Ark. 2009).

#### **Readily Ascertainable.**

The plaintiff's customer information was "readily ascertainable" and thus not trade secrets within the definition set forth in subdivision (4) of this section. *Hi-Line Elec. Co. v. Moore*, 775 F.2d 996 (8th Cir. 1985).

It is not necessary that employer's customer information be capable of exact and precise duplication in order to be readily ascertainable, especially in a market where customers do business with more than one sales company or are open to the possibility of shifting business from one company to another. *Vigoro Indus., Inc. v. Cleveland Chem. Co.*, 866 F. Supp. 1150 (E.D. Ark. 1994), *aff'd* in part, reversed in part, *Vigoro Indus., Inc. v. Crisp*, 82 F.3d 785 (8th Cir. 1996).

A finding that the information was readily accessible to competitors indicated that the plaintiff did not reasonably spend a great deal of time or effort compiling

that information, and that the plaintiff suffered no injury when a former employee used the information since he or his new employer could easily discover it from other sources. *Vigoro Indus., Inc. v. Cleveland Chem. Co.*, 866 F. Supp. 1150 (E.D. Ark. 1994), *aff'd* in part, reversed in part, *Vigoro Indus., Inc. v. Crisp*, 82 F.3d 785 (8th Cir. 1996).

Where employer's customer list consisted of fewer than 200 farmers, all of whom were located within a twenty-five to fifty-mile radius of the store, the names of these farmers were "readily ascertainable." *Vigoro Indus., Inc. v. Cleveland Chem. Co.*, 866 F. Supp. 1150 (E.D. Ark. 1994), *aff'd* in part, reversed in part, *Vigoro Indus., Inc. v. Crisp*, 82 F.3d 785 (8th Cir. 1996).

A trucking company's methods, processes, operations, marketing programs, computer programs, future plans, and customers were not readily ascertainable where the company's employees signed a confidentiality agreement, passwords and pass codes were issued to employees who were privy to such information, and only two specific employees were allowed to talk to the media. *Cardinal Freight Carriers, Inc. v. J.B. Hunt Transp. Servs., Inc.*, 336 Ark. 143, 987 S.W.2d 642 (1999).

**Cited:** *United Centrifugal Pumps v. Cusimano*, 708 F. Supp. 1038 (W.D. Ark. 1988); *Swink v. Griffin*, 333 Ark. 400, 970 S.W.2d 207 (1998); *Statco Wireless, L.L.C. v. Southwestern Bell Wireless, L.L.C.*, 80 Ark. App. 284, 95 S.W.3d 13 (2003); *Pro-Comp Mgmt. v. R.K. Enters., LLC*, 365 Ark. 111, 225 S.W.3d 389 (2006).

#### **4-75-602. Effect of subchapter on other law.**

(a) This subchapter displaces conflicting tort, restitutionary, and other law of this state pertaining to civil liability for misappropriation of a trade secret.

(b) This subchapter does not affect:

(1) Contractual or other civil liability or relief that is not based upon misappropriation of a trade secret; or

(2) Criminal liability for misappropriation of a trade secret.

**History.** Acts 1981, No. 439, § 7; A.S.A. 1947, § 70-1007.

## CASE NOTES

**Applicability.**

Were the court to determine that the information employer seeks to protect as a trade secret qualified as such, and that the employees misappropriated those trade secrets, then employer's exclusive remedy for improper use of that information would be pursuant to this subchapter. *Vigoro Indus., Inc. v. Cleveland Chem. Co.*, 866 F. Supp. 1150 (E.D. Ark. 1994), *aff'd in part, reversed in part*, *Vigoro Indus., Inc. v. Crisp*, 82 F.3d 785 (8th Cir. 1996).

This section applied where plaintiffs' tort claims of conversion and conspiracy

stemmed from the same acts constituting a violation of the Arkansas Trade Secrets Act, § 4-75-601 et seq.; thus, the statutory language of the Act displaced or preempted the award of damages based upon plaintiffs' tort claims for conversion of trade secrets, as well as other tort claims such as conspiracy, that might have arisen under a claim for misappropriation of trade secrets, and the trial court committed reversible error in its award of damages based on tort law, for tortious conversion and conspiracy. *R.K. Enter., L.L.C. v. Pro-Comp Mgmt.*, 356 Ark. 565, 158 S.W.3d 685 (2004).

**4-75-603. Statute of limitations.**

An action for misappropriation must be brought within three (3) years after the misappropriation is discovered or, by the exercise of reasonable diligence, should have been discovered. For the purposes of this section, a continuing misappropriation constitutes a single claim.

**History.** Acts 1981, No. 439, § 6; A.S.A. 1947, § 70-1006.

## CASE NOTES

**In General.**

Trial court did not err in dismissing plaintiffs' complaint for misappropriation of trade secrets as the statute of limitations was three years under this section; the cause of action arose in January 1999, when defendant left plaintiffs' employment, started a directly competing business and induced plaintiff's employees and customers to leave plaintiff's business, but the complaint was not filed until August 2002. *Quality Optical of Jonesboro, Inc. v. Trusty Optical, L.L.C.*, 365 Ark. 106, 225 S.W.3d 369 (2006).

Defendants' motion to dismiss plaintiffs' claims for trade secret misappropria-

tion under § 4-75-601, intentional interference with contractual relationships or business expectancies, fraud, unjust enrichment, and civil conspiracy was denied because there were fact issues as to whether plaintiffs' claims accrued within the applicable three-year statute of limitations set forth in this section and § 16-56-105 and whether the application of the doctrine of fraudulent concealment was appropriate, and further, plaintiffs' allegations were sufficient to withstand a motion to dismiss. *Roach Mfg. Corp. v. Northstar Indus.*, 630 F. Supp. 2d 1004 (E.D. Ark. 2009).

**4-75-604. Injunctive relief.**

(a) Actual or threatened misappropriation may be enjoined.

(b) Upon application to the court, an injunction shall be terminated when the trade secret has ceased to exist; however, the injunction may be continued for an additional reasonable period of time in order to eliminate commercial advantage that otherwise would be derived from the misappropriation.

(c) If the court determines that it would be unreasonable to prohibit future use, an injunction may condition future use upon payment of a reasonable royalty for no longer than the period of time the use could have been prohibited.

(d) In appropriate circumstances, affirmative acts to protect a trade secret may be compelled by court order.

**History.** Acts 1981, No. 439, § 2; A.S.A. 1947, § 70-1002.

## RESEARCH REFERENCES

**ALR.** Applicability of Inevitable Disclosure Doctrine Barring Employment of Competitor's Former Employee. 36 A.L.R.6th 537.

## CASE NOTES

### ANALYSIS

Evidence.

When Granted.

Scope of Relief.

### Evidence.

There was no evidence of any actual, threatened, or inevitable misappropriation where (1) the defendant had only a general working knowledge of his former employer's machines and processes and did not have in his possession any of the company's machine designs or blueprints, (2) the defendant candidly requested "guidance" from the chancellor as to what was his former employer's proprietary information so that he could avoid violating the parties' employment agreement, and (3) the defendant's vast general knowledge of the industry, as opposed to his engineering expertise, was of far greater value to his new employer than any knowledge of his former employer's trade secrets. *Bendinger v. Marshalltown Trowell Co.*, 338 Ark. 410, 994 S.W.2d 468 (1999).

Agent gave no indication that it would disclose trade secrets after it terminated its relationship with a company, nor was there any evidence that it had to necessarily do so to conduct its business; thus, there was not enough evidence to support a finding of inevitable misappropriation pursuant to § 4-75-601(2). *Statco Wireless, L.L.C. v. Southwestern Bell Wireless, L.L.C.*, 80 Ark. App. 284, 95 S.W.3d 13 (2003).

### When Granted.

The actual or threatened misappropriation of a trade secret may be enjoined under the statute; the injunction will be terminated when the trade secret has ceased to exist or after an additional reasonable period of time in order to eliminate a commercial advantage that otherwise would be derived from the misappropriation. *Cardinal Freight Carriers, Inc. v. J.B. Hunt Transp. Servs., Inc.*, 336 Ark. 143, 987 S.W.2d 642 (1999).

### Scope of Relief.

Allowing plaintiffs to prevent disclosure through an injunction fits with the purposes of this subchapter; in order to provide the plaintiffs true security, they must not only be protected from the defendant's anti-competitive use of the secrets, but also from the defendant's ability to publicly disclose such secrets, since public disclosure of the plaintiffs' secrets would render the protections under this subchapter meaningless. *Southwestern Energy Co. v. Eickenhorst*, 955 F. Supp. 1078 (W.D. Ark. 1997), *aff'd*, 175 F.3d 1025 (8th Cir. 1999).

Misappropriation may be proven and an injunction granted by demonstrating that the individual or entity will inevitably disclose the trade secrets if not enjoined. *Southwestern Energy Co. v. Eickenhorst*, 955 F. Supp. 1078 (W.D. Ark. 1997), *aff'd*, 175 F.3d 1025 (8th Cir. 1999).

Where a former employer alleged that a former employee copied trade secrets and solicited the former employer's clients to move their business to the current em-

ployer, and the former employer was granted a preliminary injunction based on nondisclosure and noncompetition provisions, although it would have been appropriate for the circuit court to enjoin the employee and the current employer under the Arkansas Trade Secrets Act also because the former employer's customer information came within the protection of the Act, this was a matter of discretion for

the circuit court and the relief obtained would have been no broader. *Freeman v. Brown Hiller, Inc.*, 102 Ark. App. 76, 281 S.W.3d 749 (2008), rehearing denied, — Ark. App. —, — S.W.3d —, 2008 Ark. App. LEXIS 361 (May 7, 2008), review denied, — Ark. —, — S.W.3d —, 2008 Ark. LEXIS 584 (Sept. 4, 2008).

**Cited:** *Allen v. Johar, Inc.*, 308 Ark. 45, 823 S.W.2d 824 (1992).

#### 4-75-605. Preservation of secrecy.

In an action under this subchapter, a court shall preserve the secrecy of an alleged trade secret by reasonable means, which may include granting protective orders in connection with discovery proceedings, holding in camera hearings, sealing the records of the action, and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval.

**History.** Acts 1981, No. 439, § 5; A.S.A. 1947, § 70-1005.

#### CASE NOTES

##### In Camera Hearings.

The decision to hold an in camera proceeding under the statute is discretionary with the chancellor. *Bendinger v. Marshalltown Trowell Co.*, 338 Ark. 410, 994 S.W.2d 468 (1999).

**Cited:** *Arkansas Dep't of Human Servs. v. Hardy*, 316 Ark. 119, 871 S.W.2d 352 (1994); *Arkansas Best Corp. v. General Elec. Capital Corp.*, 317 Ark. 238, 878 S.W.2d 708 (1994).

#### 4-75-606. Damages.

(a) In addition to or in lieu of injunctive relief, a complainant may recover damages for the actual loss caused by misappropriation.

(b) A complainant also may recover for the unjust enrichment caused by misappropriation that is not taken into account in computing damages for actual loss.

**History.** Acts 1981, No. 439, § 3; A.S.A. 1947, § 70-1003.

#### RESEARCH REFERENCES

**U. Ark. Little Rock L. Rev.** Annual Survey of Caselaw, Business Law, 24 U. Ark. Little Rock L. Rev. 883.

Annual Survey of Caselaw: Business Law, 27 U. Ark. Little Rock L. Rev. 593.

#### CASE NOTES

##### Measure of Damages.

In an action for theft of a trade secret, the plaintiff may recover either his own

lost profits or the defendant's profits, whichever affords the greater recovery. *Saforo & Assocs. v. Porocel Corp.*, 337 Ark.

553, 991 S.W.2d 117 (1999); *Brown v. Ruallam Enters., Inc.*, 73 Ark. App. 296, 44 S.W.3d 740 (2001), overruled in part, *Pro-Comp Mgmt. v. R.K. Enters., LLC*, 366 Ark. 463, 237 S.W.3d 20 (2006).

The proper method for the calculation of damages is on the basis of net profit, whether lost by the injured party or gained by the wrongdoer. *Brown v. Ruallam Enters., Inc.*, 73 Ark. App. 296, 44 S.W.3d 740 (2001), overruled in part, *Pro-Comp Mgmt. v. R.K. Enters., LLC*, 366 Ark. 463, 237 S.W.3d 20 (2006).

This section does not permit a figure determined to be the profit earned by the wrongdoer to be doubled and also does not permit such profit to be rounded off to an even number. *Brown v. Ruallam Enters., Inc.*, 73 Ark. App. 296, 44 S.W.3d 740 (2001), overruled in part, *Pro-Comp Mgmt. v. R.K. Enters., LLC*, 366 Ark. 463, 237 S.W.3d 20 (2006).

Plaintiff's testimony, coupled with plaintiff's experience in the field, supported an award of \$262,312, but such a computation of damages did not address the measure of lost profits suffered by plaintiff or the gain realized by defendants as result of the misappropriation of trade secrets as required by this section; thus, the case was reversed and remanded for a determination of damages under the statutory provisions of the Arkansas Trade Secrets Act, § 4-75-601 et seq. *R.K. Enter., L.L.C. v. Pro-Comp Mgmt.*, 356 Ark. 565, 158 S.W.3d 685 (2004).

Complainants could recover their actual loss, as may be shown by profits, along

with any unjust enrichment damages caused by the misappropriation of trade secrets and, to the extent that *Brown v. Ruallam*, 73 Ark. App. 296, 44 S.W.3d 740 (2001) was inconsistent with this ruling, it was overruled. *Pro-Comp Mgmt. v. R.K. Enters., LLC*, 366 Ark. 463, 237 S.W.3d 20 (2006).

Trial court did not err in finding that, although appellees' liability for the misappropriation of trade secrets had been proven, the evidence presented was too speculative to prove the actual damages incurred by corporations as the abstract presented did not establish either the corporations' lost profits or appellees' gains. *Pro-Comp Mgmt. v. R.K. Enters., LLC*, 366 Ark. 463, 237 S.W.3d 20 (2006).

Because the fair market value of appellants' trade secrets, as determined by the circuit court, had no relation to the value of the trade secrets at the time of the misappropriation because it involved the cost of developing and maintaining those secrets and not their exact value at the time of misappropriation, prejudgment interest was properly denied. *Pro-Comp Mgmt. v. R.K. Enters., LLC*, 372 Ark. 190, 272 S.W.3d 91 (2008).

Circuit court did not err in holding that the judgment was to apply to the corporation only because the appropriate remedy of damages was to disgorge profits, and the individuals had no profits to disgorge; the individuals were not unjustly enriched such that an award would have been proper under subsection (b) of this section. *Pro-Comp Mgmt. v. R.K. Enters., LLC*, 372 Ark. 190, 272 S.W.3d 91 (2008).

#### 4-75-607. Attorneys' fees.

The court may award reasonable attorneys' fees to the prevailing party if:

- (1) A claim of misappropriation is made in bad faith;
- (2) A motion to terminate an injunction is made or resisted in bad faith; or
- (3) Willful and malicious misappropriation exists.

**History.** Acts 1981, No. 439, § 4; A.S.A. 1947, § 70-1004.

#### RESEARCH REFERENCES

**Ark. L. Rev.** Speed, Attorney's Fees Awards in Federal Court: An Arkansas Study, 39 Ark. L. Rev. 99 (1985).

## CASE NOTES

## ANALYSIS

Appellate review.  
Evidence.

**Appellate review.**

The denial of fees and costs under this provision is reviewed on appeal under the clearly erroneous standard. *Hardwick Airmasters v. Lennox Indus., Inc.*, 78 F.3d 1332 (8th Cir. 1996).

**Evidence.**

Evidence was sufficient to show willful misappropriation of the plaintiff's trade

secret and, therefore, attorneys' fees were properly awarded, where one of the parties involved in the use of the plaintiff's trade secret required the defendant to indemnify it for any liability it might incur for theft of the trade secret. *Saforo & Assocs. v. Porocel Corp.*, 337 Ark. 553, 991 S.W.2d 117 (1999).

**Cited:** *Pro-Comp Mgmt. v. R.K. Enters., LLC*, 372 Ark. 190, 272 S.W.3d 91 (2008).

## SUBCHAPTER 7 — UNFAIR CIGARETTE SALES ACT

## SECTION.

- 4-75-701. Title.
- 4-75-702. Definitions.
- 4-75-703. Sales excepted from subchapter.
- 4-75-704. Transactions permitted to meet lawful competition.
- 4-75-705. Contracts in violation of subchapter void.
- 4-75-706. Director of Arkansas Tobacco Control — Powers and duties.
- 4-75-707. License requirement.
- 4-75-708. Sales at less than cost, rebates, concessions, etc. — Penalty.

## SECTION.

- 4-75-709. Combination sales.
- 4-75-710. Sales by a wholesaler to a wholesaler.
- 4-75-711. Determination of cost generally — Cost surveys.
- 4-75-712. Determination of cost — Sales outside ordinary channels of business.
- 4-75-713. Remedies.
- 4-75-714. Enforcement Agents — Selection — Qualifications — Authority.

**Preambles.** Acts 1951, No. 101, contained a preamble which read: "Whereas, unfair, dishonest, deceptive, destructive and fraudulent business practices existing in transactions involving the sale of, offer to sell, or inducement to sell, cigarettes in the wholesale and retail trades in this State have been and are demoralizing and disorganizing said trades; and

"Whereas, the advertising, offering for sale, or sale of cigarettes below cost in the wholesale or retail trades with the intent of injuring competitors or destroying or substantially lessening competition, is an unfair and deceptive business practice; and

"Whereas, it is hereby declared to be the policy of this State to promote the public welfare by prohibiting such sales, and to

foster and encourage competition by prohibiting unfair, dishonest, deceptive, destructive, fraudulent discriminatory practices by which fair and honest competition is destroyed or prohibited, and it is the purpose of this act to carry out that policy in the public and in the State's interest ...."

**Effective Dates.** Acts 1999, No. 1237, § 8: Apr. 8, 1999. Emergency clause provided: "It is hereby found and determined by the Eighty-second General Assembly that the Arkansas Unfair Cigarette Sales Act, 4-75-701, sets minimum selling prices for wholesale and retail sales of cigarettes in Arkansas. Although the Unfair Cigarette Sales Act contains a licensing requirement for wholesalers and retailers, its main purpose is to establish fair and

lawful competition in the wholesale and retail sale of cigarettes in Arkansas. Prior to the creation of the Tobacco Control Board in 1997, the Revenue Division of the Department of Finance and Administration has been responsible for administering the Unfair Cigarette Sales Act. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

Acts 2003, No. 627, § 6: Mar. 24, 2003. Emergency clause provided: "It is found and determined by the Eighty-Fourth General Assembly of the State of Arkansas that the Arkansas Unfair Cigarette Sales Act, § 4-75-701 et seq., sets minimum selling prices for wholesale and retail sales of cigarettes in Arkansas; that the purpose of the Unfair Cigarette Sales Act is to promote the fair and lawful competition in the wholesale and retail sale of cigarettes in the State of Arkansas; that confusion has arisen as to the proper application of the Unfair Cigarette Sales Act in light of certain promotional activities of cigarette manufacturers; that the confusion threatens to negatively impact fair and lawful competition in the wholesale and retail sale of cigarettes in the

State of Arkansas; and that the confusion threatens to negatively impact the proper and lawful collection of the gross receipts tax. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

Acts 2003, No. 1808, § 2: May 6, 2003. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that the provisions of Arkansas Code § 4-75-709(b) and (c) were added by Act 627 of 2003; that that act is now in effect; that certain provisions of those two subsections are incapable of being properly administered; that this act removes those provisions; and that until this act goes into effect, the law will contain an impossible mandate. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

## CASE NOTES

### ANALYSIS

Constitutionality.

Construction With Other Law.

Costs of Doing Business.

### Constitutionality.

The statutory scheme under this subchapter is not unconstitutional since it provides for the rational connection between the presumed cost-of-doing business and minimizing-price amounts in this subchapter and Miscellaneous Tax Regulation 1988-2 and the presumed fact of predatory intent provided. *McLane Co.*

*v. Weiss*, 332 Ark. 284, 965 S.W.2d 109 (1998).

### Construction With Other Law.

Section 26-57-256(a)(5)(A) clearly permits the Arkansas Tobacco Control Board to conduct hearings regarding any permit or license in violation of the Unfair Cigarette Sales Act. *H.T. Hackney Co. v. Davis*, 353 Ark. 797, 120 S.W.3d 79 (2003).

### Costs of Doing Business.

Finding against a cigarette wholesaler with regard to the cost of doing business was improper in part where the Arkansas Tobacco Control Board's regulation did

not fall within the Unfair Cigarette Sales Act's provision, thus, the four percent cost of doing business was improper; however, the two percent presumptive cost of doing business would then govern, thereby trig-

gering the other valid remaining provisions of the regulation. *McLane Co. v. Davis*, 353 Ark. 539, 110 S.W.3d 251 (2003).

#### 4-75-701. Title.

This subchapter shall be known and may be cited as the "Unfair Cigarette Sales Act".

**History.** Acts 1951, No. 101, § 1; A.S.A. 1947, § 70-601.

**Publisher's Notes.** In regard to the Cigarette Tax Law [repealed], cigarettes

are now taxed pursuant to the Arkansas Tobacco Products Tax Act of 1977, § 26-57-201 et seq.

### CASE NOTES

#### ANALYSIS

Constitutionality.  
In General.

#### Constitutionality.

Terms "trade discount" and "rebate" were unclear under existing Unfair Cigarette Sales Act, § 4-75-701 et seq., and the tobacco control board's regulations as to what was an allowed "trade discount" as opposed to a prohibited "rebate" were unclear; thus, the law was unconstitutionally vague under due process standards because it did not give a person of ordinary intelligence fair notice of what was prohibited, i.e., of whether payments to the retailer were permitted "trade discounts" or prohibited "rebates." *Ark. Tobacco Control Bd. v. Sitton*, 357 Ark. 357, 166 S.W.3d 550 (2004).

#### In General.

Neither "trade discounts" nor "rebates" are defined in the Unfair Cigarette Sales Act, § 4-75-701 et seq.; however, the Arkansas Tobacco Control Board defines "rebates," under Ark Tobacco Control Board Rules and Regs., § 9.1 (A). *Ark. Tobacco Control Bd. v. Sitton*, 357 Ark. 357, 166 S.W.3d 550 (2004)

Arkansas Tobacco Control Board's consideration of cooperative organizations as buying pools exempt from the anti-rebating provision, § 4-75-708, of the Unfair Cigarette Sales Act, § 4-75-701 et seq., was clearly wrong because a cooperative was considered a retailer under § 4-75-702(8) and, as such, was prohibited from providing rebates. *McLane Southern, Inc. v. Ark. Tobacco Control Bd.*, 2010 Ark. 498, — S.W.3d — (2010).

**Cited:** *Wometco Servs., Inc. v. Gaddy*, 272 Ark. 452, 616 S.W.2d 466 (1981).

#### 4-75-702. Definitions.

As used in this subchapter, unless the context otherwise requires:

(1) "Basic cost of cigarettes" means whichever of the two (2) following amounts is lower, namely, the gross invoice cost of cigarettes to the wholesaler or retailer, as the case may be, or the lowest gross replacement cost of cigarettes to the wholesaler or retailer, as the case may be, within thirty (30) days prior to the date of sale, in the quantity last purchased, whether within or before the thirty-day period, plus the full face value of any stamps or any tax which may be required by any cigarette tax act of this state or political subdivision thereof, now in

effect or hereafter enacted, if not already included in the gross invoice cost of cigarettes to the wholesaler or retailer, as the case may be;

(2) "Buying pool" means and includes any combination, corporation, association, affiliation, or group of retail dealers operating jointly in the purchase, sale, exchange, or barter of cigarettes, the profits of which accrue directly or indirectly to the retail dealers;

(3) "Cigarettes" means and includes any roll for smoking made wholly or in part of tobacco, irrespective of size or shape and whether or not the tobacco is flavored, adulterated, or mixed with any other ingredient, the wrapper or cover of which is made of paper or any other substance or material, except tobacco;

(4)(A) "Cost to the retailer" means the basic cost of the cigarettes involved to the retailer plus the cost of doing business by the retailer as evidenced by the standards and methods of accounting regularly employed by him or her and must include, without limitation, labor including salaries of executives and officers, rent, depreciation, selling costs, maintenance of equipment, delivery costs, all types of licenses, taxes, insurance, and advertising.

(B) In the absence of the filing with the Arkansas Tobacco Control Board of proof satisfactory to the board of a lesser or higher cost of doing business by the retailer making the sale, the cost of doing business by the retailer shall be presumed to be seven and one-half percent (7½%) of the basic cost of cigarettes to the retailer.

(C) In the case of any retail dealer who in connection with the retail dealer's purchase of any cigarettes shall receive not only the discounts ordinarily allowed upon purchases by a retail dealer but also in whole or in part the discounts ordinarily allowed upon purchases by a wholesale dealer, the cost of doing business by the retail dealer with respect to the said cigarettes shall be, in the absence of proof of a lesser or higher cost of doing business by the retail dealer, the sum of the cost of doing business by the retail dealer and, to the extent that he or she shall have received the full discounts ordinarily allowed to a wholesale dealer, the cost of doing business by a wholesale dealer as defined in subdivision (5)(B) of this section;

(5)(A) "Cost to wholesaler" means the basic cost of the cigarettes involved to the wholesaler plus the cost of doing business by the wholesaler as evidenced by the standards and methods of accounting regularly employed by him or her and must include, without limitation, labor costs, including salaries of executives and officers, rent, depreciation, selling costs, maintenance of equipment, delivery costs, all types of licenses, taxes, insurance, and advertising.

(B) In the absence of the filing with the board of proof satisfactory to the board of a lesser or higher cost of doing business by the wholesale dealer making the sale, the cost of doing business by the wholesale dealer shall be presumed to be four percent (4%) of the basic cost of the cigarettes to the wholesale dealer;

(6) "Director" means the Director of Arkansas Tobacco Control;

(7) "Person" means and includes any individual, firm, association, company, partnership, corporation, joint-stock company, club, agency,

syndicate, the State of Arkansas, county, municipal corporation, or other political subdivision of this state, receiver, trustee, fiduciary, or trade association;

(8) "Retailer" means and includes any person who is engaged in this state in the business of selling cigarettes at retail and includes any group of persons, cooperative organizations, buying pools, and any other person or group of retailers purchasing cigarettes on a cooperative basis from licensed distributors or wholesalers. Any person placing a cigarette vending machine at, on, or in any premises shall be deemed to be a retailer for each such vending machine;

(9) "Sale" or "sell" means any transfer for a consideration, exchange, barter, gift, offer for sale, advertising for sale, soliciting an order for cigarettes, and distribution in any manner or by any means whatsoever;

(10) "Sell at retail", "sale at retail", or "retail sales" means and includes any sale for consumption or use made in the ordinary course of trade or usual conduct of the seller's business;

(11) "Sell at wholesale", "sale at wholesale", and "wholesale sales" mean and include any sale made in the ordinary course of trade or usual conduct of the wholesaler's business to a retailer for the purpose of resale;

(12) "Wholesaler" means and includes:

(A) Any person other than a buying pool as defined in subdivision (2) of this section, wherever resident or located, who brings or causes to be brought into this state unstamped cigarettes purchased directly from the manufacturer thereof and who maintains an established place of business where substantially all of the business is the sale of cigarettes and related merchandise at wholesale to cigarette licensees and where at all times a substantial stock of cigarettes and related merchandise is available for resale, if seventy-five percent (75%) thereof are sold to retailers or other wholesalers not connected with the wholesaler by reason of any business connection or otherwise;

(B) Any person retailing cigarettes to consumers, if at least seventy-five percent (75%) of his or her purchases are made directly from the manufacturers thereof;

(C) Any person in this state other than a buying pool, as defined in subdivision (2) of this section, who purchases cigarettes from any other person who purchases from a manufacturer, at least seventy-five percent (75%) of which are for purposes of resale to retailers in this state not connected with the wholesaler by reason of any business connection or otherwise and who maintains an established place of business where cigarettes and related merchandise are sold at wholesale to persons licensed under this subchapter, and where at all times a substantial stock of cigarettes and related merchandise is available to all retailers for resale; and

(D) Any person in this state who acquires cigarettes solely for the purpose of resale in cigarette vending machines, provided the person operates thirty (30) or more machines;

(13) “Gross invoice cost” means the manufacturer’s or wholesaler’s price for the product sold as listed on the invoice to the wholesaler or retailer, as the case may be, before any deduction for allowances, whether manufacturer promotional allowances or otherwise, or for discounts of any kind; and

(14) “Manufacturer promotional allowance” means any payment or compensation given by a manufacturer of cigarettes to wholesalers or to retailers to promote the sale of cigarettes and which the manufacturer requires the wholesaler to pass on to the retailer and the retailer to pass on to the retailer’s customer.

**History.** Acts 1951, No. 101, § 2; A.S.A. 1947, § 70-602; Acts 1999, No. 1237, § 1; 2003, No. 627, §§ 1-4; 2009, No. 785, § 1.

**Amendments.** The 2009 amendment

substituted “Director of Arkansas Tobacco Control” for “Director of the Arkansas Tobacco Control Board” in (6).

## CASE NOTES

### ANALYSIS

Constitutionality.

Costs.

Retailer.

### Constitutionality.

Amendment to subdivisions (1) and (5)(B) of this section that increased the presumed “cost of doing business” from two and three quarters percent to four percent of the basic cost of the cigarettes to a wholesaler was constitutional; there was a rational basis for the amendment as the legislature could have found that changed market conditions supported an increase in the cost of doing business. *McLane S., Inc. v. Davis*, 366 Ark. 164, 233 S.W.3d 674 (2006).

The 2003 amendment to subdivision (5)(B) of this section merely clarified where and generally what type of proof a wholesaler must file in order to make a below-cost sale of cigarettes; these changes do not cause the subdivision to violate the due process protections of the Arkansas or U.S. Constitutions. *McLane S., Inc. v. Davis*, 366 Ark. 164, 233 S.W.3d 674 (2006).

### Costs.

Finding against a cigarette wholesaler with regard to the cost of doing business was improper in part where the Arkansas Tobacco Control Board’s regulation did not fall within the Unfair Cigarette Sales Act’s provision, thus, the four percent cost of doing business was improper; however, the two percent presumptive cost of doing business would then govern, thereby triggering the other valid remaining provisions of the regulation. *McLane Co. v. Davis*, 353 Ark. 539, 110 S.W.3d 251 (2003).

### Retailer.

Arkansas Tobacco Control Board’s consideration of cooperative organizations as buying pools exempt from the anti-rebating provision, § 4-75-708, of the Unfair Cigarette Sales Act, § 4-75-701 et seq., was clearly wrong because a cooperative was considered a retailer under subdivision (8) of this section and, as such, was prohibited from providing rebates. *McLane Southern, Inc. v. Ark. Tobacco Control Bd.*, 2010 Ark. 498, — S.W.3d — (2010).

**Cited:** *McLane Co. v. Weiss*, 332 Ark. 284, 965 S.W.2d 109 (1998).

## 4-75-703. Sales excepted from subchapter.

The provisions of this subchapter shall not apply to a sale at wholesale or a sale at retail made:

(1) In an isolated transaction and not in the usual course of business;

(2) Where cigarettes are advertised, offered for sale, or sold in a bona fide clearance sale for the purpose of discontinuing trade in such cigarettes, and the advertising, offer to sell, or sale shall state the reason therefor and the quantity of such cigarettes advertised, offered for sale, or to be sold;

(3) Where cigarettes are advertised, offered for sale, or sold as imperfect or damaged, and the advertising, offer to sell, or sale shall state the reason therefor and the quantity of the cigarettes advertised, offered for sale, or to be sold;

(4) Where cigarettes are sold upon the final liquidation of a business; or

(5) Where cigarettes are advertised, offered for sale, or sold by any fiduciary or other officer acting under the order or direction of any court.

**History.** Acts 1951, No. 101, § 6; A.S.A. 1947, § 70-606.

#### CASE NOTES

**Cited:** McLane Co. v. Weiss, 332 Ark. 284, 965 S.W.2d 109 (1998).

#### **4-75-704. Transactions permitted to meet lawful competition.**

(a)(1) Any wholesaler may advertise, offer to sell, or sell cigarettes at a price made in good faith to meet the price of a competitor who is rendering the same type of service and is selling the same article at cost to the competing wholesaler as defined by this subchapter.

(2) Any retailer may advertise, offer to sell, or sell cigarettes at a price made in good faith to meet the price of a competitor who is selling the same article at cost to the competing retailer as defined in this subchapter.

(b) The price of cigarettes advertised, offered for sale, or sold under the exceptions specified in § 4-75-703 shall not be considered the price of a competitor and shall not be used as a basis for establishing prices below cost, nor shall the price established at a bankrupt sale be considered the price of a competitor within the purview of this section.

(c) In the absence of proof of the actual cost to the competing wholesaler or to the competing retailer, as the case may be, the cost may be presumed to be the lowest cost to wholesalers or the lowest cost to retailers, as the case may be, within the same trading area as determined by a cost survey made pursuant to § 4-75-711(b).

**History.** Acts 1951, No. 101, § 7; A.S.A. 1947, § 70-607.

#### CASE NOTES

##### **Made in Good Faith.**

Because patronage dividends paid to retailers by cooperatives constituted ille-

gal rebates under § 4-75-708(b), any attempt by a wholesaler to match that price could in no way be made in good faith

where the plain language of subdivision (a)(1) of this section allowed a wholesaler to sell at a price made in good faith to meet the price of a competitor. *McLane*

*Southern, Inc. v. Ark. Tobacco Control Bd.*, 2010 Ark. 498, — S.W.3d — (2010).

**Cited:** *McLane Co. v. Weiss*, 332 Ark. 284, 965 S.W.2d 109 (1998).

#### **4-75-705. Contracts in violation of subchapter void.**

Any contract, express or implied, made by any person in violation of any of the provisions of this subchapter is illegal and void and no recovery shall be had thereon.

**History.** Acts 1951, No. 101, § 8; A.S.A. 1947, § 70-608.

#### **4-75-706. Director of Arkansas Tobacco Control — Powers and duties.**

(a)(1) The Director of Arkansas Tobacco Control shall prescribe, adopt, and enforce rules relating to the administration and enforcement of this subchapter.

(2)(A) The director is empowered to and may from time to time undertake and make or cause to be made one (1) or more cost surveys for the state or such trading area as he or she shall define, and when the cost survey shall have been made by or approved by the director, it shall be permissible to use the cost survey as provided in § 4-75-711(b).

(B) The director is also empowered to investigate price fixing.

(3) The director may revoke or suspend the license issued under the provisions of this subchapter of any person who refuses or neglects to comply with any provisions of this subchapter or any rule of the director prescribed under this subchapter.

(b) Whenever any person fails to comply with any provision of this subchapter or any rule of the director promulgated under this subchapter, the director, upon a hearing, after giving the person ten (10) days' notice in writing specifying the time and place of the hearing and requiring the person to show cause why his or her license should not be revoked, may revoke or suspend the license held by the person.

(c) Any ruling, order, or decision of the director shall be subject to review, as provided by law, in any court of competent jurisdiction in the county in which the person affected resides.

**History.** Acts 1951, No. 101, § 12; A.S.A. 1947, § 70-612; Acts 1999, No. 1237, § 2; 2009, No. 785, § 2.

**Amendments.** The 2009 amendment substituted "Director of Arkansas Tobacco

Control" for "Director of the Arkansas Tobacco Control Board" in (a)(1); and deleted "and regulations" following "rules" or variant in (a)(1) and (b).

#### **CASE NOTES**

##### **Costs.**

Finding against a cigarette wholesaler with regard to the cost of doing business

was improper in part where the Arkansas Tobacco Control Board's regulation did not fall within the Unfair Cigarette Sales

Act's provision, thus, the four percent cost of doing business was improper; however, the two percent presumptive cost of doing business would then govern, thereby triggering the other valid remaining provi-

sions of the regulation. *McLane Co. v. Davis*, 353 Ark. 539, 110 S.W.3d 251 (2003).

**Cited:** *McLane Co. v. Weiss*, 332 Ark. 284, 965 S.W.2d 109 (1998).

#### **4-75-707. License requirement.**

(a) No person shall engage in or conduct the business of purchasing for resale or selling cigarettes without having first obtained the appropriate license for that purpose.

(b) All such licenses shall be issued by the Director of Arkansas Tobacco Control or his or her designated agent, who shall make rules respecting applications therefor and issuance thereof.

(c) A wholesaler or retailer who sells or intends to sell cigarettes at one (1) or more places of business shall be required to obtain a separate license for each place of business.

(d) Any person licensed only as a wholesaler shall not operate as a retailer unless the appropriate license therefor is first secured, and any person licensed only as a retailer shall not operate as a wholesaler unless the appropriate license therefor is first secured.

**History.** Acts 1951, No. 101, § 13; A.S.A. 1947, § 70-613; Acts 1999, No. 1237, § 3; 2009, No. 785, § 3.

in (b), substituted "Director of Arkansas Tobacco Control" for "Director of the Arkansas Tobacco Control Board," and deleted "and regulations" following "rules."

**Amendments.** The 2009 amendment,

#### **4-75-708. Sales at less than cost, rebates, concessions, etc. — Penalty.**

(a) It shall be unlawful for any wholesaler, retailer, or salesperson with intent to injure competitors or destroy or substantially lessen competition to advertise, offer to sell, or sell, at retail or wholesale, cigarettes at less than cost to the wholesaler or retailer, as the case may be.

(b) It shall be unlawful for any wholesaler, retailer, or salesperson to offer a rebate in price, to give a rebate in price, to offer a concession of any kind, or to give a concession of any kind or nature whatsoever in connection with the sale of cigarettes with intent to injure competitors or destroy or substantially lessen competition.

(c) It shall be unlawful for any retail dealer to induce or attempt to induce or to procure or attempt to procure:

(1) The purchase of cigarettes at a price less than cost to the wholesaler; or

(2) Any rebate or concession of any kind in connection with the purchase of cigarettes.

(d) Any wholesaler, retailer, or salesperson who violates this section shall be guilty of a violation and upon conviction shall be subject to a fine of not more than five hundred dollars (\$500).

(e) The following shall be prima facie evidence of intent to injure competitors and destroy or substantially limit competition:

(1) The advertisement, offer for sale, or sale of cigarettes by any wholesaler, retailer, or salesperson at less than cost to him or her;

(2) Any offer of a rebate in price or the giving of a rebate in price or an offer of a concession or the giving of a concession of any kind in connection with the sale of cigarettes; or

(3) Inducing or attempting to induce or procuring or attempting to procure the purchase of cigarettes at a price less than cost to the wholesaler or the retailer.

**History.** Acts 1951, No. 101, § 3; A.S.A. 1947, § 70-603; Acts 2003, No. 373, § 1; 2005, No. 1994, § 40.

## RESEARCH REFERENCES

**U. Ark. Little Rock L. Rev.** Survey of Assembly, Business Law, 26 U. Ark. Little Rock L. Rev. 351.

## CASE NOTES

### ANALYSIS

Constitutionality.  
Administrative Remedies.  
Anti-Rebating.  
Construction With Other Law.  
Costs.  
Patronage Dividends.

### Constitutionality.

Terms “trade discount” and “rebate” were unclear under existing Unfair Cigarette Sales Act, § 4-75-701 et seq., and the tobacco control board’s regulations as to what was an allowed “trade discount” as opposed to a prohibited “rebate” were unclear; thus, the law was unconstitutionally vague under due process standards because it did not give a person of ordinary intelligence fair notice of what was prohibited, specifically, whether payments to the retailer were permitted “trade discounts” or prohibited “rebates.” Ark. Tobacco Control Bd. v. Sitton, 357 Ark. 357, 166 S.W.3d 550 (2004).

Because rebates make it more difficult to enforce and administer the Arkansas Unfair Cigarette Sales Act, § 4-75-701 et seq., the legislature may have decided to prohibit them; thus, the anti-rebate provisions found in subsection (e) of this section do not violate the due process protections of the Arkansas or U.S. Constitutions. McLane S., Inc. v. Davis, 366 Ark. 164, 233 S.W.3d 674 (2006).

### Administrative Remedies.

Where the Arkansas Tobacco Control Board charged company with violating the anti-rebating provisions of the Arkansas Unfair Cigarette Sales Act, subsection (b) of this section, the company was required to exhaust its administrative remedies before seeking declaratory relief in the form of preliminary and permanent injunctions in the circuit court; moreover, company’s constitutional argument could be raised and developed at the administrative level. McLane S., Inc. v. Davis, 80 Ark. App. 30, 90 S.W.3d 16 (2002).

### Anti-Rebating.

Arkansas Tobacco Control Board’s consideration of cooperative organizations as buying pools exempt from the anti-rebating provision, this section of the Unfair Cigarette Sales Act, § 4-75-701 et seq., was clearly wrong because a cooperative was considered a retailer under § 4-75-702(8) and, as such, was prohibited from providing rebates. McLane Southern, Inc. v. Ark. Tobacco Control Bd., 2010 Ark. 498, — S.W.3d — (2010).

### Construction With Other Law.

Section 26-57-256(a)(5)(A) clearly permits the Arkansas Tobacco Control Board to conduct hearings regarding any permit or license in violation of the Unfair Cigarette Sales Act. H.T. Hackney Co. v. Davis, 353 Ark. 797, 120 S.W.3d 79 (2003).

**Costs.**

Finding against a cigarette wholesaler with regard to the cost of doing business was improper in part where the Arkansas Tobacco Control Board's regulation did not fall within the Unfair Cigarette Sales Act's provision, thus, the four percent cost of doing business was improper; however, the two percent presumptive cost of doing business would then govern, thereby triggering the other valid remaining provisions of the regulation. *McLane Co. v. Davis*, 353 Ark. 539, 110 S.W.3d 251 (2003).

**Patronage Dividends.**

Because patronage dividends paid to retailers by cooperatives constituted illegal rebates under subsection (b) of this section, any attempt by a wholesaler to match that price could in no way be made in good faith where the plain language of § 4-75-704(a)(1) allowed a wholesaler to sell at a price made in good faith to meet the price of a competitor. *McLane Southern, Inc. v. Ark. Tobacco Control Bd.*, 2010 Ark. 498, — S.W.3d — (2010).

**Cited:** *McLane Co. v. Weiss*, 332 Ark. 284, 965 S.W.2d 109 (1998).

**4-75-709. Combination sales.**

(a)(1) In all advertisements, offers for sale, or sales involving two (2) or more items, at least one (1) of which items is cigarettes, at a combined price, and in all advertisements, offers for sale, or sales involving the giving of any gift or concession of any kind, whether coupons or otherwise, the wholesaler's or retailer's combined selling price shall not be below the cost to the wholesaler or the cost to the retailer, respectively, of the total of all articles, products, commodities, gifts, and concessions included in the transactions.

(2) If any such articles, products, commodities, gifts, or concessions shall not be cigarettes, the basic cost thereof shall be determined in the manner provided in § 4-75-702(1).

(b) The redemption by a retailer of coupons supplied to consumers by manufacturers and redeemable from the retailer by the manufacturers is not a violation of this subchapter if the sum of the coupon and other consideration paid by the consumer is not below the cost to the retailer.

(c) Any manufacturer's promotional allowance provided to a wholesaler or retailer may be passed on to the purchaser by the wholesaler or retailer without violating this subchapter if the sum of the manufacturer's promotional allowance and other consideration paid by the purchaser is not below the cost to the wholesaler or retailer, as the case may be.

**History.** Acts 1951, No. 101, § 4; A.S.A. 1947, § 70-604; Acts 2003, No. 627, § 5; 2003, No. 1808, § 1.

**4-75-710. Sales by a wholesaler to a wholesaler.**

When one wholesaler sells cigarettes to any other wholesaler, the former shall not be required to include in his or her selling price to the latter the cost to the wholesaler, as provided by § 4-75-702, but the latter wholesaler, upon resale to a retailer, shall be subject to the provisions of that section.

**History.** Acts 1951, No. 101, § 5; A.S.A. 1947, § 70-605.

#### **4-75-711. Determination of cost generally — Cost surveys.**

(a) In determining cost to the wholesaler and cost to the retailer, the court shall receive, and consider as bearing on the bona fides of the cost, evidence tending to show that any person complained against under any of the provisions of this subchapter purchased the cigarettes involved in the complaint before the court at a fictitious price or upon terms or in such manner or under such invoices as to conceal the true cost, discounts, or terms of purchase, and shall also receive and consider as bearing on the bona fides of the costs, evidence of the normal, customary, and prevailing terms and discounts in connection with other sales of a similar nature in the trade area or state.

(b) Where a cost survey pursuant to recognized statistical and cost accounting practices has been made for the trading area in which a violation of this subchapter is committed or charged to determine and establish on the basis of actual existing conditions the lowest cost to wholesalers or the lowest cost to retailers within the area, the cost survey shall be deemed competent evidence in any action or proceeding under this subchapter as tending to prove actual cost to the wholesaler or actual cost to the retailer complained against, but any party against whom any such cost survey may be introduced in evidence shall have the right to offer evidence tending to prove any inaccuracy of the cost survey or any state of facts which would impair its probative value.

**History.** Acts 1951, No. 101, § 9; A.S.A. 1947, § 70-609.

#### **CASE NOTES**

##### **Costs.**

Finding against a cigarette wholesaler with regard to the cost of doing business was improper in part where the Arkansas Tobacco Control Board's regulation did not fall within the Unfair Cigarette Sales Act's provision, thus, the four percent cost of doing business was improper; however,

the two percent presumptive cost of doing business would then govern, thereby triggering the other valid remaining provisions of the regulation. *McLane Co. v. Davis*, 353 Ark. 539, 110 S.W.3d 251 (2003).

**Cited:** *McLane Co. v. Weiss*, 332 Ark. 284, 965 S.W.2d 109 (1998).

#### **4-75-712. Determination of cost — Sales outside ordinary channels of business.**

In establishing the basic cost of cigarettes to a wholesaler or a retailer, it shall not be permissible to use the invoice cost or the actual cost of any cigarettes purchased at a forced, bankrupt, or closeout sale, or other sale outside of the ordinary channels of trade.

**History.** Acts 1951, No. 101, § 10; A.S.A. 1947, § 70-610.

**4-75-713. Remedies.**

(a) The Director of Arkansas Tobacco Control or any person injured by any violation or who would suffer injury from any threatened violation of this subchapter may maintain an action in any court of equitable jurisdiction to prevent, restrain, or enjoin the violation or threatened violation.

(b)(1) If, in such action, a violation or threatened violation of this subchapter is established, the court shall enjoin and restrain, or otherwise prohibit, the violation or threatened violation, and in addition thereto, the court shall assess in favor of the plaintiff and against the defendant the costs of suit including reasonable attorney's fees.

(2) In the action it is not necessary that actual damages to the plaintiff be alleged or proved, but where alleged or proved, the plaintiff in the action, in addition to the injunctive relief and costs of suit, including reasonable attorney's fees, shall be entitled to recover from the defendant the actual damages sustained by him or her.

(c) In the event that no injunctive relief is sought or required, any person injured by a violation of this subchapter may maintain an action for damages and costs of suit in any court of general jurisdiction.

**History.** Acts 1951, No. 101, § 11; substituted "Director of Arkansas Tobacco Control" for "Director of the Arkansas Tobacco Control Board" in (a).  
A.S.A. 1947, § 70-611; Acts 1999, No. 1237, § 4; 2009, No. 785, § 4.

**Amendments.** The 2009 amendment

**RESEARCH REFERENCES**

**Ark. L. Rev.** Speed, Attorney's Fees Awards in Federal Court: An Arkansas Study, 39 Ark. L. Rev. 99.

**CASE NOTES**

**Cited:** McLane Co. v. Davis, 353 Ark. 539, 110 S.W.3d 251 (2003).

**4-75-714. Enforcement Agents — Selection — Qualifications — Authority.**

(a) The Arkansas Tobacco Control Board is designated as a law enforcement agency.

(b) The Director of Arkansas Tobacco Control shall assign personnel as agents of Arkansas Tobacco Control to conduct investigations of violations of tobacco laws in this state.

(c) Personnel assigned as agents of the board shall:

(1) Be considered a law enforcement officer by the Arkansas Commission on Law Enforcement Standards and Training under § 12-9-101 et seq.; and

(2) Have statewide law enforcement authority.

**History.** Acts 2001, No. 1699, § 1; 2009, No. 785, § 5.

**Amendments.** The 2009 amendment rewrote the section.

## SUBCHAPTER 8 — MILK AND OTHER DAIRY PRODUCTS

### SECTION.

4-75-801. Purpose.

4-75-802. Definition.

4-75-803. Institutions excepted from application of subchapter.

4-75-804. Penalties.

4-75-805. Sales at less than equivalent competitive price.

4-75-806. Rebates, refunds, etc., considered as costs.

### SECTION.

4-75-807. Fresh dairy products — Unlawful to limit quantity of purchase.

4-75-808. Furnishing equipment free or at less than cost unlawful — Exceptions.

4-75-809. Remedies.

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**Cross References.** Arkansas Grade 'A' Milk Program Act of 1981, § 20-59-401 et seq.

**Preambles.** Acts 1955, No. 380, contained a preamble which read: "Whereas, It is recognized and determined by the General Assembly of the State of Arkansas that fresh wholesome milk is an essential food item upon which the health and welfare of the people of this State depend to a large extent; and

"Whereas, It is determined that price wars in the milk processing and/or distributing industry, or acts that tend to cause price wars in this industry have the effect of endangering the availability of an adequate supply of fresh wholesome milk at all times, and tend to reduce the quality of milk sold for human consumption in this State; and

"Whereas, It is determined that in order

to assure an adequate supply of fresh wholesome milk of high quality this act is necessary...."

**Effective Dates.** Acts 1963, No. 268, § 3: Mar. 18, 1963. Emergency clause provided: "It is hereby found and determined by the general assembly that a number of vendors of fresh dairy products are engaging in unfair practices regarding the sale of such products; that such unfair practices are injurious to the stability of milk prices in this state and are unfairly harming many milk producers in this state; and that the immediate passage of this act is necessary to correct such situation. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

## RESEARCH REFERENCES

**Ark. L. Rev.** The Milk Contract Bill — Sale of Commodities Below Cost, 9 Ark. L. Rev. 403.

## CASE NOTES

### Applicability.

Sections 4-75-801 — 4-75-806, 4-75-808 and 4-75-809 do not apply to retail grocery

stores. *Central Ark. Milk Producers Ass'n v. Consumer's Whse. Mkt., Inc.*, 229 Ark. 934, 319 S.W.2d 511 (1958).

**4-75-801. Purpose.**

(a) It is not the intention of §§ 4-75-801 — 4-75-806, 4-75-808, and 4-75-809 to guarantee a profit to any person, firm, or corporation engaged in the business of processing or distributing milk, and any such person, firm, or corporation shall be free to meet competitive prices in this state, as herein provided.

(b) However, it is the intention of §§ 4-75-801 — 4-75-806, 4-75-808, and 4-75-809 to prevent any person, firm, or corporation engaged in the business of processing or distributing milk from lowering its selling price below cost, as defined in § 4-75-802, plus four percent (4%), except as hereinafter stated.

**History.** Acts 1955, No. 380, § 1; A.S.A. 1947, § 70-701.

**4-75-802. Definition.**

(a) As used in §§ 4-75-801 — 4-75-806, 4-75-808, and 4-75-809, unless the context otherwise requires, “cost” includes the price the processor or distributor pays the producer for fresh milk, plus the cost of doing business, which shall include labor, including salaries of executives and officers, rent, interest, depreciation, selling costs, maintenance of equipment, transportation and delivery costs, credit losses, all types of permit and license fees, all taxes, insurance, advertising, and any and all overhead expenses of the processor or distributor or expenses incident to doing business.

(b) In the event any action is instituted in any court in this state under §§ 4-75-801 — 4-75-806, 4-75-808, and 4-75-809, costs, including the cost of raw milk, shall be determined by the average costs of such processor or distributor for the thirty-day period previous to the date of the alleged violation.

(c) A profit from the sale of other products, including ice cream and other frozen foods, shall not be used in cost computations to subsidize or lower the costs of doing business in the sale of fresh milk.

**History.** Acts 1955, No. 380, § 3; A.S.A. 1947, § 70-703.

**4-75-803. Institutions excepted from application of subchapter.**

Sections 4-75-801 — 4-75-806, 4-75-808, and 4-75-809 shall not apply to federal government institutions, state tax-supported charitable or penal institutions, or church-supported orphanages.

**History.** Acts 1955, No. 380, § 7; A.S.A. 1947, § 70-707.

**4-75-804. Penalties.**

The sale, offer, or advertisement for sale of fresh milk in violation of the provisions of §§ 4-75-801 — 4-75-806, 4-75-808, and 4-75-809 is declared to be for the purpose of destroying competition and any person, firm, or corporation found to be in violation hereof shall be guilty of a Class B misdemeanor. Each day's violation shall constitute a separate offense.

**History.** Acts 1955, No. 380, § 5; A.S.A. 1947, § 70-705; Acts 2005, No. 1994, § 379.

**4-75-805. Sales at less than equivalent competitive price.**

(a) It shall be unlawful for any person, firm, or corporation, or combination thereof, engaged in this state in the business of processing or distributing fresh milk, either at retail or wholesale, to sell, offer for sale, or advertise for sale, fresh milk at less than four percent (4%) over and above the cost of purchasing, processing, and distributing the fresh milk, either at wholesale or retail, unless the sale, offer for sale, or advertisement for sale at less than cost plus four percent (4%) is for the purpose of meeting equivalent competitive prices of a processor or distributor in any county.

(b) Equivalent competitive prices, as used in this section, means any legal wholesale or retail price, not less than the minimum prices provided herein, at which fresh fluid milk is sold, advertised, or offered for sale by the competitor who sells not less than five percent (5%) of the total fresh fluid milk sales in that county.

**History.** Acts 1955, No. 380, § 2; A.S.A. 1947, § 70-702.

**CASE NOTES****Retail Stores.**

A retail grocery store is not a distributor within the meaning of §§ 4-75-801 — 4-75-806, 4-75-808 and 4-75-809 and the use of the word "retail" in this section does

not make it otherwise. *Central Ark. Milk Producers Ass'n v. Consumer's Whse. Mkt., Inc.*, 229 Ark. 934, 319 S.W.2d 511 (1958).

**4-75-806. Rebates, refunds, etc., considered as costs.**

The payment or allowance of rebates, refunds, commissions, or discounts, whether in the form of money or otherwise, or the extending to certain purchasers of special services or privileges not extended to all purchasers purchasing upon like terms and conditions, or the offering of a combined price for fresh milk or any fresh milk product with another commodity or service which is less than the aggregate of the prices for which the milk or milk products and other commodity or service is offered for sale, shall be considered costs of doing business in each separate sale or transaction, and each separate sale or transaction

must stand the test of cost plus four percent (4%) as provided in § 4-75-805.

**History.** Acts 1955, No. 380, § 4; A.S.A. 1947, § 70-704.

#### **4-75-807. Fresh dairy products — Unlawful to limit quantity of purchase.**

(a) It shall be unlawful for any vendor of fresh dairy products in this state who advertises or displays any of the products for sale at specified prices to restrict or limit the number or quantity of any such products to be sold to any purchaser desiring to purchase the products so long as the supply of the products to be purchased is available.

(b)(1) Any person violating the provisions of this section shall be guilty of a violation and upon conviction shall be punished by a fine of not more than one hundred dollars (\$100).

(2) Each violation of this section shall be punishable as a separate offense.

**History.** Acts 1963, No. 268, § 1; A.S.A. 1947, § 70-708; Acts 2005, No. 1994, § 41.

#### **4-75-808. Furnishing equipment free or at less than cost unlawful — Exceptions.**

(a) It shall be unlawful to furnish any free equipment other than to public schools, parochial schools, private schools, colleges, or universities.

(b) Any equipment furnished or sold to any person, firm, or corporation by a processor or distributor or his or her or its agent, or designee, other than to public schools, parochial schools, private schools, colleges, or universities, shall be sold at a price not less than actual cost, including installation cost if paid or agreed to be paid by the processor or distributor or his or her or its agents, less ten percent (10%) per year allowance for age of the equipment prior to the installation. Any time or deferred price therefor shall not be payable for a term of more than one (1) year from date of installation.

**History.** Acts 1955, No. 380, § 4; A.S.A. 1947, § 70-704.

#### **4-75-809. Remedies.**

(a) In addition to any remedy herein or otherwise and elsewhere provided, any person, firm, or corporation, or combination thereof, may be enjoined in a court of competent jurisdiction by any affected person, firm, or corporation from the violation of any of the provisions of §§ 4-75-801 — 4-75-806, 4-75-808, or 4-75-809.

(b) Any person, firm, or corporation found by the court to be in violation of any of the provisions of §§ 4-75-801 — 4-75-806, 4-75-808,

or 4-75-809 shall be liable for three (3) times the amount of the actual damages, if any, sustained by any injured person, firm, or corporation as the result of the violations.

**History.** Acts 1955, No. 380, § 6; A.S.A. 1947, § 70-706.

## SUBCHAPTER 9 — MOTION PICTURES

### SECTION.

4-75-901. Purpose.

4-75-902. Definitions.

4-75-903. Penalties.

4-75-904. Injunctions.

### SECTION.

4-75-905. Trade screening — Blind bidding prohibited.

4-75-906. Bidding procedures.

### 4-75-901. Purpose.

The purpose of this subchapter is to establish fair and open procedures for the bidding and negotiation of motion pictures within the state in order to prevent unfair and deceptive acts or practices and unreasonable restraints of trade in the business of motion picture distribution within the state, promote fair and effective competition in that business, and benefit the movie-going public by holding down admission prices to motion picture theatres, expanding the choice of motion pictures available to the public, and preventing exposure of the public to objectionable or unsuitable motion pictures by ensuring that exhibitors have the opportunity to view a picture before committing themselves to exhibiting it.

**History.** Acts 1981, No. 606, § 1; A.S.A. 1947, § 70-1101.

### 4-75-902. Definitions.

As used in this subchapter, unless the context otherwise requires:

(1) “Bid” means a written or oral offer or proposal by an exhibitor to a distributor, in response to an invitation to bid or otherwise, stating the terms under which the exhibitor will agree to exhibit a motion picture;

(2) “Blind bidding” means the bidding for, negotiating for, or offering or agreeing to terms for the licensing or exhibition of a motion picture if the motion picture has not been trade screened within the state or at the nearest film exchange before any such event has occurred;

(3) “Distributor” means any person engaged in the business of distributing or supplying motion pictures to exhibitors by rental, sale, or licensing;

(4) “Exhibit” or “exhibition” means showing a motion picture to the public for a charge;

(5) “Exhibitor” means any person engaged in the business of operating one (1) or more theatres;

(6) "Invitation to bid" means a written or oral solicitation or invitation by a distributor to one (1) or more exhibitors to bid or negotiate for the right to exhibit a motion picture;

(7) "License agreement" means any contract, agreement, understanding, or condition between a distributor and an exhibitor relating to the licensing or exhibition of a motion picture by the exhibitor;

(8) "Person" includes one (1) or more individuals, partnerships, associations, societies, trusts, or corporations;

(9) "Run" means the continuous exhibition of a motion picture in a defined geographic area for a specified period of time. A "first run" is the first exhibition of a picture in a designated area; a "second run" is the second exhibition; and "subsequent runs" are subsequent exhibitions after the second run;

(10) "Theatre" means any establishment in which motion pictures are exhibited to the public regularly for a charge; and

(11) "Trade screening" means the showing of a motion picture by a distributor in one (1) of the three (3) largest cities within the state or at the nearest film exchange which is open to any exhibitor interested in exhibiting the motion picture.

**History.** Acts 1981, No. 606, § 2; A.S.A. 1947, § 70-1102.

#### **4-75-903. Penalties.**

Any person violating or failing to comply with the provisions of this subchapter shall be guilty of a violation and upon conviction shall be subject to a fine of one hundred dollars (\$100) for each day the violation or noncompliance continues.

**History.** Acts 1981, No. 606, § 5; A.S.A. 1947, § 70-1105; Acts 2005, No. 1994, § 42.

#### **4-75-904. Injunctions.**

Any court of competent jurisdiction is authorized, upon petition of a party in interest, to enjoin any violation of or noncompliance with the provisions of this subchapter.

**History.** Acts 1981, No. 606, § 6; A.S.A. 1947, § 70-1106.

#### **4-75-905. Trade screening — Blind bidding prohibited.**

(a)(1) Blind bidding is prohibited within the state.

(2) No bids shall be returnable, no negotiations for the exhibition or licensing of a motion picture shall take place, and no license agreement or any of its terms shall be agreed to, for the exhibition of any motion picture within the state before the motion picture has been trade screened within the state or at the nearest film exchange.

(b) A distributor shall include in each invitation to bid for a motion picture for exhibition within the state, if the motion picture has not already been trade screened within the state or at the nearest film exchange, the date, time, and place of the trade screening of the motion picture within the state or at the nearest film exchange.

(c) A distributor shall provide reasonable and uniform notice to exhibitors within the state of all trade screenings within the state or at the nearest film exchange of motion pictures he or she is distributing.

(d) Any purported waiver of the requirements of this section shall be void and unenforceable.

**History.** Acts 1981, No. 606, § 3; A.S.A. 1947, § 70-1103.

#### **4-75-906. Bidding procedures.**

If bids are solicited from exhibitors for the licensing of a motion picture within this state, then:

(1) The invitation to bid shall specify:

(A) The number and length of runs for which the bid is being solicited, whether it is a first, second, or subsequent run, and the geographic area for each run;

(B) The names of all exhibitors who are being solicited;

(C) The date and hour the invitation to bid expires; and

(D) The location, including the address, where the bids will be opened, which shall be within this state or at the nearest film exchange;

(2) All bids shall be submitted in writing and shall be opened at the same time and in the presence of exhibitors, or their agents, who submitted bids and are present at the time, in one (1) of the three (3) largest cities within the state or at the nearest film exchange;

(3) After being opened, bids shall be subject to examination by exhibitors or their agents who submitted bids. Within seven (7) business days after a bid is opened, the distributor shall notify in writing each exhibitor who submitted a bid of the terms of the accepted bid and the name of the winning bidder; and

(4) Once bids are solicited, the distributor shall license the picture only by bidding and may solicit rebids or negotiate if he or she does not accept any of the submitted bids.

**History.** Acts 1981, No. 606, § 4; A.S.A. 1947, § 70-1104.

## **CHAPTER 76**

### **COPYRIGHT ROYALTY COLLECTION**

#### **SECTION.**

4-76-101. Short title.

4-76-102. Definitions.

#### **SECTION.**

4-76-103. Licensing negotiations.

4-76-104. Form of contract.

## SECTION.

4-76-105. Improper licensing practices.

4-76-106. Code of conduct.

## SECTION.

4-76-107. Civil remedies — Injunction.

4-76-108. Application.

**4-76-101. Short title.**

This chapter may be cited as the “Copyright Royalty Collection Practices Act”.

**History.** Acts 1997, No. 648, § 1.

**4-76-102. Definitions.**

In this chapter:

(1) “Copyright owner” means the owner of a copyright of a musical work, other than a motion picture or audiovisual work, recognized and enforceable under the copyright laws of the United States pursuant to Title 17 of the United States Code, Pub. L. 94-554, 17 U.S.C. § 101 et seq.;

(2) “Performing rights society” means an association or corporation that licenses the nondramatic public performance of musical works on behalf of copyright owners, such as:

(A) The American Society of Composers, Authors and Publishers, also known as ASCAP;

(B) Broadcast Music, Inc., also known as BMI; and

(C) SESAC, Inc., also known as SESAC;

(3) “Proprietor” means the owner or operator of a retail establishment, restaurant, inn, bar, tavern, or other similar place of business located in this state in which the public may assemble and in which musical works may be performed, broadcast, or otherwise transmitted; and

(4) “Royalty” or “royalties” means the fees payable to a performing rights society for public performance rights.

**History.** Acts 1997, No. 648, § 2.

**4-76-103. Licensing negotiations.**

No performing rights society shall offer to enter into or enter into a contract for the payment of royalties by a proprietor unless, at the time of the offer or any time thereafter, but no later than seventy-two (72) hours prior to the execution of that contract, it provides to the proprietor, in writing, the following:

(1) A schedule of the rates and terms of royalties under the contract;

(2) At the request of the proprietor, the opportunity to review the most current available list of the members or affiliates represented by the society;

(3) Notice that it will make available, on written request of any proprietor, at the sole expense of the proprietor, the most current available listing of the copyrighted musical works in the performing

rights society's repertory, provided that the notice specifies the means by which such information can be secured; and

(4) A toll-free number that the proprietor can use to obtain answers to specific questions concerning the performing rights society's repertoire.

**History.** Acts 1997, No. 648, § 3.

#### **4-76-104. Form of contract.**

Every contract between a performing rights society and a proprietor for the payment of royalties executed in this state shall:

- (1) Be in writing;
- (2) Be signed by the parties; and
- (3) Include at least the following information:
  - (A) The proprietor's name and business address and the name and location of each place of business to which the contract applies;
  - (B) The name and address of the performing rights society;
  - (C) The duration of the contract; and
  - (D) The schedule of rates and terms of the royalties to be collected under the contract, including any sliding scale or schedule for any increase or decrease of those rates for the duration of that contract.

**History.** Acts 1997, No. 648, § 4.

#### **4-76-105. Improper licensing practices.**

No performing rights society or any agent or employee thereof shall collect or attempt to collect from a proprietor licensed by that performing rights society a royalty payment except as provided in a contract executed pursuant to the provisions of this chapter.

**History.** Acts 1997, No. 648, § 5.

#### **4-76-106. Code of conduct.**

No performing rights society or any agent, employee, or representative thereof shall:

- (1) Engage in any coercive act or practice that is disruptive of a proprietor's business; or
- (2) Enter onto the premises of a proprietor's business for the purpose of discussing or inquiring about a contract for payment of royalties for the use of copyrighted works by that proprietor, without first identifying himself or herself to the proprietor or to the proprietor's management employees, including showing his or her photo identification card and disclosing that he or she is acting on behalf of the performing rights society and disclosing the purpose of the entry.

**History.** Acts 1997, No. 648, § 6.

**4-76-107. Civil remedies — Injunction.**

Any person who suffers a violation of this chapter may bring an action to recover actual damages and reasonable attorney's fees and seek an injunction or any other remedy available at law or in equity.

**History.** Acts 1997, No. 648, § 7.

**4-76-108. Application.**

(a) This chapter shall not apply to contracts between performing rights societies and broadcasters licensed by the Federal Communications Commission or to contracts with cable operators, programmers, or other transmission services.

(b) This chapter does not apply to investigations by law enforcement officers or other persons concerning a suspected violation of § 5-37-510(c).

**History.** Acts 1997, No. 648, § 8.

**CHAPTERS 77-85**

[Reserved]

***SUBTITLE 7. CONSUMER PROTECTION*****CHAPTER 86****GENERAL PROVISIONS****SECTION.**

4-86-101. Breach of warranty — Liability.

4-86-102. Liability of supplier.

4-86-103. Unsolicited merchandise.

4-86-104. Interest on deposits for freight and parcel delivery services.

4-86-105. Grave markers or headstones.

**SECTION.**

4-86-106. Automatic renewal of professional home security contracts prohibited.

4-86-107. Prohibiting the misappropriation of social security numbers.

4-86-108. [Repealed.]

**RESEARCH REFERENCES**

**ALR.** Escalators. 1 A.L.R.4th 144.  
 Flammable clothing. 1 A.L.R.4th 251.  
 Defect in boat or its parts, supplies, or equipment. 1 A.L.R.4th 411.  
 Defective heating equipment. 1 A.L.R.4th 748.  
 Prosthesis or other product designed to be surgically implanted in patient's body. 1 A.L.R.4th 921.  
 Diethylstilbestrol. 2 A.L.R.4th 1091.

Snow throwers. 2 A.L.R.4th 1284.  
 Defective vehicular windows. 3 A.L.R.4th 489.  
 Farm machinery. 4 A.L.R.4th 13.  
 Vehicular bumpers. 5 A.L.R.4th 483.  
 Personal injury or death allegedly caused by defect in electrical system in motor vehicle. 5 A.L.R.4th 662.  
 Clothes dryers. 6 A.L.R.4th 1262.  
 Glue and other adhesive products. 7

A.L.R.4th 155.

Elevators. 7 A.L.R.4th 852.

Industrial presses. 8 A.L.R.4th 70.

Liability of manufacturer, seller, or distributor of motor vehicle for defect which merely enhances injury from accident otherwise caused. 9 A.L.R.4th 494.

Applicability of comparative negligence doctrine to actions based on strict liability in tort. 9 A.L.R.4th 633.

Workers' Compensation Act as furnishing exclusive remedy for employee injured by product manufactured, sold, or distributed by employer. 9 A.L.R.4th 873.

Transformers and other electrical equipment. 10 A.L.R.4th 854.

Ladders. 11 A.L.R.4th 1118.

Fertilizers, insecticides, pesticides, etc. 12 A.L.R.4th 462.

Allowances of punitive damages. 13 A.L.R.4th 52.

Preemption of strict liability in tort by provisions of U.C.C., Article 2. 15 A.L.R.4th 791.

Firearms, ammunition, and chemical weapons. 15 A.L.R.4th 910.

Tire rims and wheels. 16 A.L.R.4th 137.

Firefighting equipment. 19 A.L.R.4th 326.

"Concert of activity" or similar theory as basis for imposing liability upon one or more manufacturers of defective uniform product, in absence of identification of manufacturer of precise unit or batch causing injury. 22 A.L.R.4th 183.

Mechanical or chain saw or components thereof. 22 A.L.R.4th 206.

Validity and construction of statute terminating right of action for product-caused injury at fixed period after manufacture, sale, or delivery of product. 30 A.L.R.5th 1.

Adequacy of warning provided to user of product. 26 A.L.R.4th 377.

Protective clothing and equipment. 27 A.L.R.4th 815.

Strict products liability for failure to warn as dependent on defendant's knowledge of danger. 33 A.L.R.4th 368.

Stud guns, staple guns, or parts thereof. 33 A.L.R.4th 1189.

Appliances for cleaning, washing, etc. 34 A.L.R.4th 95.

Household appliance: Liability of manufacturer or seller. 34 A.L.R.4th 95; 35 A.L.R.4th 663.

Patent or obvious dangers. 35 A.L.R.4th 861.

Furnishings for home or office. 36 A.L.R.4th 170.

Bottle explosion or breakage. 36 A.L.R.4th 419.

Liability of person furnishing, installing, or servicing burglary or fire alarm system for burglary or fire loss. 37 A.L.R.4th 47.

Postinjury measures undertaken by defendant. 38 A.L.R.4th 583.

Manufacturer's responsibility for defective component supplied by another and incorporated in product. 39 A.L.R.4th 6.

Alteration of product after it leaves hands of manufacturer or seller as affecting for product-caused harm. 41 A.L.R.4th 47.

Perfumes, colognes, or deodorants. 46 A.L.R.4th 1197.

Evidence of industry custom or practice. 47 A.L.R.4th 621.

Sufficiency of evidence to support product misuse defense in product liability actions concerning athletic, exercise, or recreational equipment. 50 A.L.R.4th 1226.

Admissibility of evidence of absence of other accidents in products liability action. 51 A.L.R.4th 1186.

Sufficiency of evidence to support product misuse defense in products liability actions concerning wearing apparel. 52 A.L.R.4th 276.

Attorney's fees in products liability suit. 53 A.L.R.4th 414.

Personal soaps. 54 A.L.R.4th 574.

Sufficiency of evidence to support product misuse defense in products liability actions concerning electrical generation and transmission equipment. 55 A.L.R.4th 1010.

Sufficiency of evidence to support product misuse defense in products liability action concerning lawn mowers. 55 A.L.R.4th 1062.

Civil liability for tobacco sales to minors. 55 A.L.R.4th 1238.

Products liability of pertussis vaccine manufacturers. 57 A.L.R.4th 911, 98 A.L.R. Fed. 124.

Commercial renter's negligence liability for consumer's personal injuries. 57 A.L.R.4th 1186.

Sufficiency of evidence to support product misuse defense in actions concerning food, drugs, and other products intended for ingestion. 58 A.L.R.4th 7.

Sufficiency of evidence to support prod-

uct misuse defense in actions concerning cosmetics and other personal care products. 58 A.L.R.4th 40.

Sufficiency of evidence to support product misuse defense in products liability actions concerning paint, cleaners, or other chemicals. 58 A.L.R.4th 76.

Sufficiency of evidence to support product misuse defense in actions concerning gas and electric appliances. 58 A.L.R.4th 131.

Sufficiency of evidence to support product misuse defense in actions concerning bottles, cans, storage tanks, or other containers. 58 A.L.R.4th 160.

Toxic shock syndrome. 59 A.L.R.4th 50.

Sufficiency of evidence to support product misuse defense in actions concerning ladders and scaffolds. 59 A.L.R.4th 73.

Sufficiency of evidence to support product misuse defense in actions concerning weapons and ammunition. 59 A.L.R.4th 102.

Polyvinyl chloride. 59 A.L.R.4th 129.

What goods or property are "used," "secondhand" or the like for purposes of state consumer laws prohibiting claims that such items are new. 59 A.L.R.4th 1192.

Sufficiency of evidence to support misuse defense in actions concerning agricultural implements and equipment. 60 A.L.R.4th 678.

Electricity. 60 A.L.R.4th 732.

Falling of displayed, stored, or piled objects, liability for injury to customer or other invitee of retail store by. 61 A.L.R.4th 27.

Overhead garage doors and openers. 61 A.L.R.4th 94.

Sufficiency of evidence to support product misuse defense in action concerning building components and materials. 61 A.L.R.4th 156.

Sufficiency of evidence to support product misuse defense in actions concerning automobiles, boats, aircraft, and other vehicles. 63 A.L.R.4th 18.

Mascara and other eye cosmetics. 63 A.L.R.4th 105.

Sufficiency of evidence to support product misuse defense in actions concerning commercial or industrial equipment and machinery. 64 A.L.R.4th 10.

Admissibility of experimental or test evidence to disprove defect in motor vehicle. 64 A.L.R.4th 125.

Misuse defense. 65 A.L.R.4th 263.

Malfunction of product or occurrence of accident as evidence of defect. 65 A.L.R.4th 346.

Sudden or unexpected acceleration of motor vehicle. 66 A.L.R.4th 20.

Liability of manufacturer of oral live polio vaccine for injury or death from its administration. 66 A.L.R.4th 83.

Liability for injury incurred in operation of power golf cart. 66 A.L.R.4th 662.

Liability of owner or operator of business premises for injury to patron by dog or cat. 67 A.L.R.4th 976.

What is "unavoidably safe" product. 70 A.L.R.4th 16.

Recovery for damage to product alone. 72 A.L.R.4th 12.

Motor vehicle exhaust systems. 72 A.L.R.4th 62.

Industrial refrigeration equipment. 72 A.L.R.4th 90.

Implied warranty coverage for service transactions under state consumer protection and deceptive trade statutes. 72 A.L.R.4th 282.

Tractors. 75 A.L.R.4th 312.

Contributory negligence or assumption of risk as defense in action for strict liability or breach of warranty based on failure to provide safety device for product causing injury. 75 A.L.R.4th 538.

Bicycles and accessories. 76 A.L.R.4th 117.

Exercise and related equipment. 76 A.L.R.4th 145.

Trampolines and similar devices. 76 A.L.R.4th 171.

Competitive sports equipment. 76 A.L.R.4th 201.

Skiing equipment. 76 A.L.R.4th 256.

Mechanical amusement rides and devices. 77 A.L.R.4th 1121.

Burden of proving feasibility of alternative safe design in products liability action based on defective design. 78 A.L.R.4th 154.

Lubricating products and systems. 80 A.L.R.4th 972.

Liability of cosmetology school for injury to patron. 81 A.L.R.4th 444.

All-terrain vehicles. 83 A.L.R.4th 70.

Liability of auctioneer under doctrine of strict products liability. 83 A.L.R.4th 1188.

Cutting or heating torches. 84 A.L.R.4th 1123.

Liability for injury or death allegedly caused by spoilage or contamination of beverage. 87 A.L.R.4th 804.

Constitutional right to jury trial in cause of action under state unfair or deceptive trade practices law. 54 A.L.R.5th 631.

**Am. Jur.** 17 Am. Jur. 2d, Cons. & Bor. Pro. § 1 et seq.

**Ark. L. Rev.** Cantu, A New Look at an

Old Conundrum: The Determinative Test for the Hybrid Sales/Service Transaction Under Section 402A of the Restatement (Second) of Torts, 45 Ark. L. Rev. 913.

**C.J.S.** 21 C.J.S., Cr. Rep. Ag. § 23 et seq.

## 4-86-101. Breach of warranty — Liability.

The lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer or seller of goods to recover damages for breach of warranty, express or implied, or for negligence, although the plaintiff did not purchase the goods from the defendant, if the plaintiff was a person whom the manufacturer or seller might reasonably have expected to use, consume, or be affected by the goods.

**History.** Acts 1965, No. 35, § 1; A.S.A. 1947, § 85-2-318.1.

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Products Liability — Assumption of Risk and Contributory Negligence as Defense, 23 Ark. L. Rev. 297.

The Return of Caveat Venditor as the Law of Products Liability, 23 Ark. L. Rev. 355.

Products Liability — Extent of Manufacturers Liability for Breach of Warranty, 24 Ark. L. Rev. 374.

Torts — Strict Liability: Protection for the Bystander in Products Cases, 26 Ark. L. Rev. 106.

Note, The Arkansas Product Liability Act of 1979, 35 Ark. L. Rev. 364.

**U. Ark. Little Rock L.J.** Survey—Business Law, 10 U. Ark. Little Rock L.J. 89.

### CASE NOTES

#### ANALYSIS

Applicability.

Persons Protected.

#### Applicability.

This section has no effect on suits filed prior to its effective date. Knowles v. Vick Chem. Co., 240 Ark. 125, 398 S.W.2d 204 (1966).

The dismissal without prejudice of an action pending on the effective date of this section and the filing thereafter of an identical complaint by and against the same parties did not render this section

applicable. Myers v. Council Mfg. Corp., 276 F. Supp. 541 (W.D. Ark. 1967).

This section is not limited to cases involving injury or damage to persons or property. Mack Trucks of Ark., Inc. v. Jet Asphalt & Rock Co., 246 Ark. 101, 437 S.W.2d 459 (1969), overruled in part, Cavette v. Ford Motor Credit Co., 260 Ark. 874, 545 S.W.2d 612 (Ark. 1977).

This section was applicable in suit for breach of implied warranty of fitness against manufacturer of trucks and against dealer. Mack Trucks of Ark., Inc. v. Jet Asphalt & Rock Co., 246 Ark. 101, 437 S.W.2d 459 (1969), overruled in part,

*Cavette v. Ford Motor Credit Co.*, 260 Ark. 874, 545 S.W.2d 612 (Ark. 1977).

This section, relating to liability for breach of warranty, does not limit strict liability actions to injuries to the ultimate consumer or user; nevertheless, the product has to meet the definition of unreasonably dangerous found in § 16-116-102. *Elk Corp. v. Jackson*, 291 Ark. 448, 725 S.W.2d 829 (1987), rehearing denied, *Elk Corp. v. Jackson*, 291 Ark. 448, 727 S.W.2d 856 (1987).

In a negligence action, the real question was whether the property appraiser owed any legal duty to the plaintiff property owners, and the plaintiffs' reliance on §§ 4-86-101, 16-114-303, and 16-22-310 to support their proposition that privity of contract with an appraiser was not a requirement in their negligence suit was misplaced. *Marlar v. Daniel*, 368 Ark. 505, 247 S.W.3d 473 (2007).

#### **Persons Protected.**

The question of whether the plaintiff was a person protected by this section is one of fact. *Mack Trucks of Ark., Inc. v. Jet Asphalt & Rock Co.*, 246 Ark. 101, 437 S.W.2d 459 (1969), overruled in part,

*Cavette v. Ford Motor Credit Co.*, 260 Ark. 874, 545 S.W.2d 612 (Ark. 1977).

The intention to permit a second purchaser or even a lessor from a purchaser to recover for breach of warranty seems implicit in the language providing that lack of privity should not be a defense although the plaintiff did not purchase the goods from the defendant. *Mack Trucks of Ark., Inc. v. Jet Asphalt & Rock Co.*, 246 Ark. 101, 437 S.W.2d 459 (1969), overruled in part, *Cavette v. Ford Motor Credit Co.*, 260 Ark. 874, 545 S.W.2d 612 (Ark. 1977).

When a seller of tomato seed warrants it to be of a particular fitness and variety, the warranty extends in the distributive chain to a purchaser of tomato plants which are grown from the seeds for commercial purposes. *L.A. Green Seed Co. v. Williams*, 246 Ark. 463, 438 S.W.2d 717 (1969).

**Cited:** *Marion Power Shovel Co. v. Huntsman*, 246 Ark. 152, 437 S.W.2d 784 (1969); *Flippo v. Mode O'Day Frock Shops*, 248 Ark. 1, 449 S.W.2d 692 (1970); *Blagg v. Fred Hunt Co.*, 272 Ark. 185, 612 S.W.2d 321 (1981); *Ford Motor Credit Co. v. Harper*, 671 F.2d 1117 (8th Cir. 1982).

### **4-86-102. Liability of supplier.**

(a) A supplier of a product is subject to liability in damages for harm to a person or to property if:

(1) The supplier is engaged in the business of manufacturing, assembling, selling, leasing, or otherwise distributing the product;

(2) The product was supplied by him or her in a defective condition that rendered it unreasonably dangerous; and

(3) The defective condition was a proximate cause of the harm to a person or to property.

(b) The provisions of subsection (a) of this section apply although the claiming party has not obtained the product from or entered into any contractual relation with the supplier.

(c)(1) Any licensee under § 17-42-103(7)(A) who is only providing brokerage and sales services under his or her license shall not be considered a supplier under this section.

(2)(A) Except as provided in subdivisions (c)(2)(B) and (C) of this section, real estate and improvements located on real estate shall not be considered a product under this section.

(B) Any tangible object or good produced that is affixed to, installed on, or incorporated into real estate or any improvement on real estate shall be considered a product under this section.

(C) If environmental contaminants exist or have occurred in an improvement on real estate, the improvement on real estate shall be considered a product under this section.

**History.** Acts 1973, No. 111, §§ 1, 2; A.S.A. 1947, §§ 85-2-318.2, 85-2-318.3; Acts 2007, No. 316, § 1.

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## CASE NOTES

### ANALYSIS

Applicability.

Causation.

Defect.

Instructions.

Open and Obvious Danger.

Product.

Proof.

Punitive Damages.

Statute of Limitations.

Suppliers.

Unreasonably Dangerous.

### Applicability.

Section held not retroactive in application to cause of action which accrued prior to its passage since section created a new

cause of action. General Motors Corp. v. Tate, 257 Ark. 347, 516 S.W.2d 602 (1974). But see Forrest City Mach. Works, Inc. v. Aderhold, 273 Ark. 33, 616 S.W.2d 720 (1981).

Where grain cart was designed and manufactured prior to, and plaintiff was injured after, the passage of this section, trial court was correct in applying the statute to plaintiff since the prohibition against bill of attainder, ex post facto law and laws which impair the obligation of contracts did not apply to this section to prevent its retroactive application. Forrest City Mach. Works, Inc. v. Aderhold, 273 Ark. 33, 616 S.W.2d 720 (1981).

Neither the Arkansas Products Liability Act, § 16-116-101 et seq., nor this

section, the Arkansas strict liability statute, apply to the commercial leasing of an industrial building because the lease of the building does not qualify as a “product” within the meaning of the Arkansas statutes. *McMichael v. United States*, 856 F.2d 1026 (8th Cir. 1988).

Though majority of courts in the United States hold that a strict liability action cannot be successful if the only damages that occur are to the product itself, state law endorses the minority view allowing recovery in instances where the only damages are to the defective product itself. *Alaskan Oil, Inc. v. Central Flying Serv., Inc.*, 975 F.2d 553 (8th Cir. 1992).

Where worker was injured as a result of a defective platform, provided for his use by a contractor, this section did not apply because the contractor was not a supplier engaged in the business of manufacturing assembling, selling, leasing or otherwise distributing the defective product within the meaning of this section. *Sproles v. Associated Brigham Contractors*, 319 Ark. 94, 889 S.W.2d 740 (1994), overruled, *Suneson v. Holloway Constr. Co.*, 337 Ark. 571, 992 S.W.2d 79 (Ark. 1999).

Court rejected a tractor manufacturer's claim that the executor of a decedent's estate fraudulently joined a non-diverse tractor seller in her tort action against the manufacturer and the seller and remanded the executor's action to state court because (1) the claim against the seller was based on this section, and the court determined that the Arkansas Supreme Court would find that the seller, a corporation with a revoked charter, could be sued; (2) there was no basis for concluding that the state of the seller's citizenship would be changed by revocation of its charter as the seller had been incorporated by the State of Arkansas, and to the extent it had any citizenship, it was a citizen of the State of Arkansas under 28 U.S.C.S. § 1332(c)(1); and (3) while the seller might be judgment-proof, but that did not dictate a finding that the executor had no intention to take a judgment against it as there might be liability insurance or other assets from which a judgment could be collected, in spite of the seller's corporate status, and even with the virtual abolition of joint liability under Arkansas law, an uncollectible judgment against one defendant might serve to increase the amount collectible on a judg-

ment against another defendant pursuant to § 16-55-203. *Davis v. CNH Am. LLC*, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 25774 (W.D. Ark. Mar. 17, 2008).

### **Causation.**

In the absence of direct proof of a specific defect, it is sufficient if a plaintiff negates other possible causes of failure of the product, not attributable to the defendant, and thus raises a reasonable inference that the defendant is responsible for the defect. *Southern Co. v. Graham*, 271 Ark. 223, 607 S.W.2d 677 (1980); *Higgins v. GMC*, 287 Ark. 390, 699 S.W.2d 741 (1985).

Evidence sufficiently negated the other possible causes argued by defendant and, therefore, defendant was responsible for plaintiffs' damages. *Southern Co. v. Graham*, 271 Ark. 223, 607 S.W.2d 677 (1980).

Directed verdict for seller not warranted where jury could have found that later acts of negligence by third persons were merely concurrent, not superseding, causes of user's death. *Moody Equip. & Supply Co. v. Union Nat'l Bank*, 273 Ark. 319, 619 S.W.2d 637 (1981).

When a vehicle suddenly goes out of control while being operated, driver error is a likely cause, absent a reliable explanation in the alternative; however that factor can be ruled out, when the circumstances are such that common experience teaches that the accident would not have occurred in the absence of a defect. *Yielding v. Chrysler Motor Co.*, 301 Ark. 271, 783 S.W.2d 353 (1990).

The evidence presented by plaintiff in her effort to assign liability to the manufacturer was not substantial enough to negate the existence of other possibilities of sources of contamination. *Campbell Soup Co. v. Gates*, 319 Ark. 54, 889 S.W.2d 750 (1994).

Plaintiff plant owner's strict liability claim against defendant, the manufacturer of an allegedly defective vending machine, failed where the owner was unable to demonstrate that the cause of the fire was a manufacturing defect. *Wise Co. v. Dixie-Narco, Inc.*, — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 2347 (E.D. Ark. Jan. 4, 2006).

Vehicle manufacturer was properly granted summary judgment in a driver's product liability suit alleging that injuries he sustained when he struck a tree while

driving his vehicle were a result of defects in the air bag and seat belt and that the manufacturer was strictly liable for his injuries because pursuant to §§ 4-86-102(a), 16-116-102(7)(A), the driver had to prove that the product was unreasonably dangerous because of a design or manufacturing defect for which the manufacturer was responsible and he also had to prove that the product was in a defective condition at the time it left the hands of the particular seller, but the driver offered no evidence regarding the existence of a specific defect in the occupant protection system, requiring speculation as to whether it was defective at the time it left the manufacturer's control, and the driver failed to demonstrate liability on the basis of circumstantial evidence because the intricacies of occupant protection systems and their potential design or manufacturing defects were outside the realm of a juror's everyday experience, and there were other potential explanations for the driver's injuries other than a defect for which the manufacturer would be responsible. *Ruminer v. GMC*, 483 F.3d 561 (8th Cir. 2007).

### **Defect.**

Where there was no evidence of alteration, adjustment, etc., of the vehicle after it left the manufacturer, the jury could properly find that the defect existed when the vehicle left the factory and could allow recovery against the manufacturer. *Harrell Motors, Inc. v. Flanery*, 272 Ark. 105, 612 S.W.2d 727 (1981).

Proof of a specific defect is not required when common experience teaches that the accident would not have occurred in the absence of a defect; the mere fact of an accident, standing alone, does not make out a case that the product is defective, but the addition of other facts tending to show the defect existed before the accident, may be sufficient. *Higgins v. GMC*, 287 Ark. 390, 699 S.W.2d 741 (1985).

A user's testimony alone may be sufficient evidence of a defect. *Higgins v. GMC*, 287 Ark. 390, 699 S.W.2d 741 (1985).

Although the evidence established that a coating product did not adhere to the plaintiff's swimming pool and that the peeling coating caused injury to some people's feet, that evidence did not show that the product was defective, an essential element of a strict liability claim. *Lakev-*

*iew Country Club, Inc. v. Superior Prods.*, 325 Ark. 218, 926 S.W.2d 428 (1996).

District court did not err by refusing to grant tobacco company's motion for judgment as a matter of law because there was sufficient evidence to support the jury's verdict on the claim that its cigarettes had a design defect; the decedant's doctor testified that decedant died from the effects of cigarette smoke, the tobacco company's cigarettes had higher levels of carcinogenic tar than any other brand, and they lacked effective filter technology. *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594 (8th Cir. 2005).

In buyer's action against seller and two manufacturers, the trial court did not err in granting summary judgment on the theory of strict liability where buyer failed to submit proof that the used Hydro-Ax machine that he purchased for his logging business was defective and unreasonably dangerous; according to the testimony of buyer's own experts, the only defect that was found in the machine — the absence of a fire suppression system — was remedied by the inclusion of a fire suppression system on the machine when it was originally purchased. *Pilcher v. Suttle Equip. Co.*, 365 Ark. 1, 223 S.W.3d 789 (2006).

Summary judgment dismissing plaintiff consumers' claim was affirmed where consumers failed to show the product was unreasonably dangerous or had either a manufacturing or design defect at the time it was purchased; supplier liability was also was not proven. *Martin v. E-Z Mart Stores, Inc.*, 464 F.3d 827 (8th Cir. 2006).

### **Instructions.**

Since, under Arkansas law, the burden of proof in strict liability is quantitatively greater than it is in a breach of warranty action, as a general rule a failure to instruct the jury on the warranty issue cannot be rendered harmless by the granting of instructions on strict liability. *Brewer v. Jeep Corp.*, 724 F.2d 653 (8th Cir. 1983).

Where jury instruction was proffered on the meaning of "unreasonably dangerous" that simply quoted the statutory definition in full, but the court rejected this instruction and gave the jury instead an instruction that tracked only the first sentence of the statute, omitting any reference to the legal definition of unreason-

ably dangerous as to a minor, it was error to refuse the instruction defining unreasonably dangerous as to a minor. *Harris v. Pacific Floor Mach. Mfg. Co.*, 856 F.2d 64 (8th Cir. 1988).

The plaintiff originally has the burden of proving the warnings or instructions provided on a product's label were inadequate; once a plaintiff proves the lack of an adequate warning or instruction, a presumption arises that the user would have read and heeded adequate warnings or instructions, rebuttable by evidence which persuades the trier of fact that an adequate warning or instruction would have been futile under the circumstances. *Bushong v. Garman Co.*, 311 Ark. 228, 843 S.W.2d 807 (1992).

If the proof regarding inadequate cattle feed shows that the feed was simply supplied in a defective condition, the strict liability instruction should not be given; however, if the proof shows that the feed was defective and unreasonably dangerous, for example, that it was toxic, the instruction should be given. *Purina Mills, Inc. v. Askins*, 317 Ark. 58, 875 S.W.2d 843 (1994).

### **Open and Obvious Danger.**

The open and obvious danger rule is not an automatic bar to recovery on a strict liability claim in a defective design case. *Lockley v. Deere & Co.*, 933 F.2d 1378 (8th Cir. 1991), rehearing denied, — F.2d —, 1991 U.S. App. LEXIS 13096 (8th Cir. June 20, 1991).

A manufacturer's failure to warn of a danger does not give rise to liability when the dangerous defect is open and obvious, and whether contributory negligence should preclude recovery is generally a question of fact for the jury. *Lockley v. Deere & Co.*, 933 F.2d 1378 (8th Cir. 1991), rehearing denied, — F.2d —, 1991 U.S. App. LEXIS 13096 (8th Cir. June 20, 1991).

### **Product.**

Where third purchaser of home filed complaint that carpet and pad installed by defendant builder emitted strong odor and fumes of formaldehyde, the word "product" used in this section was held to apply to a house, thus giving plaintiff a cause of action under a strict liability theory. *Blagg v. Fred Hunt Co.*, 272 Ark. 185, 612 S.W.2d 321 (1981).

The language of this section cannot conceivably be stretched to encompass a street as a product; the developer of a residential subdivision is obviously not engaged in the business of manufacturing, assembling, selling, leasing, or distributing streets. *Milam v. Midland Corp.*, 282 Ark. 15, 665 S.W.2d 284 (1984), overruled, *Suneson v. Holloway Constr. Co.*, 337 Ark. 571, 992 S.W.2d 79 (Ark. 1999).

### **Proof.**

Plaintiff is not required to prove a specific defect when common experience tells us that the accident would not have occurred in the absence of a defect. *Williams v. Smart Chevrolet Co.*, 292 Ark. 376, 730 S.W.2d 479 (1987).

The doctrine of strict liability does not change the burden of proof as to the existence of a flaw or defect in a product; however, it does away with the necessity of proving negligence in order to recover for injuries resulting from a defective product. *Southern Co. v. Graham*, 271 Ark. 223, 607 S.W.2d 677 (1980); *Williams v. Smart Chevrolet Co.*, 292 Ark. 376, 730 S.W.2d 479 (1987).

The definitions in § 16-116-102 of the key terms "defective condition" and "unreasonably dangerous," when applied to this section, impose no requirement that a feasible and safer alternative be proven by a plaintiff in a personal injury action; the existence, practicality, and technological feasibility of an alternative safe design are not necessary elements of the plaintiff's cause of action, but rather are merely factors, that may be considered by the jury in determining whether a product was supplied in a defective condition that rendered it unreasonably dangerous. *French v. Grove Mfg. Co.*, 656 F.2d 295 (8th Cir. 1981).

In order for a cause of action for strict liability to lie, Arkansas law requires demonstration of the additional element that the defect be of such a nature as to cause the product to become unreasonably dangerous. *Brewer v. Jeep Corp.*, 724 F.2d 653 (8th Cir. 1983).

In order to recover under the strict product liability theory, the plaintiff must prove (1) that he has sustained damages; (2) that the defendant was engaged in the business of manufacturing or assembling or selling or leasing or distributing the product; (3) that the product was supplied

by the defendant in a defective condition which rendered it unreasonably dangerous; and (4) that the defective condition was a proximate cause of plaintiff's damages. *E.I. Du Pont de Nemours & Co. v. Dillaha*, 280 Ark. 477, 659 S.W.2d 756 (1983).

The procedural effect of strict liability in product liability actions is that the plaintiff is relieved of proving any negligence of the defendant whatsoever; this differs from the application of *res ipsa loquitur* which requires the defendant to go forward with evidence to offset the inference of negligence, but the primary burden of proving negligence still rests with the plaintiff. *Stalter v. Coca-Cola Bottling Co.*, 282 Ark. 443, 669 S.W.2d 460 (1984).

The adoption in this section of the doctrine of strict liability in torts in products liability cases does not change the burden of proof as to the existence of a defect in a product. Such proof may be by circumstantial evidence. *Petrus Chrysler-Plymouth v. Davis*, 283 Ark. 172, 671 S.W.2d 749 (1984).

A plaintiff must prove the product was defective so as to render it unreasonably dangerous, and that the defect was the cause of the injury. *Higgins v. GMC*, 287 Ark. 390, 699 S.W.2d 741 (1985); *Yielding v. Chrysler Motor Co.*, 301 Ark. 271, 783 S.W.2d 353 (1990).

The mere fact that under certain circumstances an accident may occur in connection with the use of a product does not make the product unreasonably dangerous for purposes of strict liability. *Elk Corp. v. Jackson*, 291 Ark. 448, 725 S.W.2d 829 (1987), rehearing denied, *Elk Corp. v. Jackson*, 291 Ark. 448, 727 S.W.2d 856 (1987).

Mere fact of an accident, standing alone, does not make out a case that product was defective, nor does fact that it was found in a defective condition after the event; but addition of other facts tending to show that defect existed before the accident may make out a sufficient case. *Williams v. Smart Chevrolet Co.*, 292 Ark. 376, 730 S.W.2d 479 (1987).

Defendant grader manufacturer was entitled to summary judgment on a strict liability claim under subsection (a) of this section; plaintiff county had no direct proof that the grader was defective because of a manufacturing flaw or inad-

equately design, and the county had not sufficiently negated the possibility that the failure of the hydraulic hose resulted from normal wear and tear or the natural loosening of the hose connection. *Lee County v. Volvo Constr. Equip. N. Am., Inc.*, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 95745 (E.D. Ark. Nov. 20, 2008).

### **Punitive Damages.**

A plaintiff who proceeds solely under a strict products liability theory may seek punitive damages under Arkansas law. *Lockley v. Deere & Co.*, 933 F.2d 1378 (8th Cir. 1991), rehearing denied, — F.2d —, 1991 U.S. App. LEXIS 13096 (8th Cir. June 20, 1991).

### **Statute of Limitations.**

This section which governs causes of action based on strict liability creates a new right that was not available at common law; but does not contain a specific period of limitation. Such actions are governed by the general statute of limitations applicable to all products liability cases in § 16-116-103. Therefore, § 16-56-116 operates to extend the time for minors to file a products liability action brought on a strict liability theory. *Harris v. Standardized San. Sys.*, 658 F. Supp. 438, 1987 U.S. Dist. LEXIS 3255 (W.D. Ark. 1987) revised on other grounds, 856 F.2d 64 (8th Cir. 1988).

### **Suppliers.**

A railroad company which owned a hopper car was a "supplier" of that car under the plain meaning of this section. *Parker v. Seaboard C.L.R.R.*, 573 F.2d 1004 (8th Cir. 1978).

The supplying of blood for transfusions is a service rather than a product; blood is not a "product" for purposes of imposing strict liability in tort. *Kirkendall v. Harbor Ins. Co.*, 887 F.2d 857 (8th Cir. 1989).

In suit involving an allegedly defective wheel and tire brought against the tire manufacturer, wheel manufacturer, and truck manufacturer, judgment as a matter of law was awarded to defendant truck manufacturer where plaintiffs offered no evidence that the wheel involved was supplied by the truck manufacturer, nor that the truck manufacturer was the original designer of the wheel. *Fought v. Hayes Wheels Int'l, Inc.*, 101 F.3d 1275 (8th Cir. 1996).

In a case involving the group of diet drugs popularly known as Fen/Phen, the

court, citing the factors involved in applying strict liability to a pharmacist's role as supplier in prescription drug transactions, declined to extend the rule of strict supplier liability to pharmacists. *Kohl v. American Home Prods. Corp.*, 78 F. Supp. 2d 885 (W.D. Ark. 1999).

### **Unreasonably Dangerous.**

The phrase "unreasonably dangerous" as used in this section requires that the defect render the product not simply deficient but dangerous; it contemplates a type of defect which renders the product not merely inadequate, but one which poses an actual danger to persons or property. *Berkeley Pump Co. v. Reed-Joseph Land Co.*, 279 Ark. 384, 653 S.W.2d 128 (1983).

The fact that irrigation pumps failed to produce the volume of water desired or expected by the buyer raised issues of warranty, negligence or misrepresentation, but it did not render the pumps "unreasonably dangerous." *Berkeley Pump Co. v. Reed-Joseph Land Co.*, 279 Ark. 384, 653 S.W.2d 128 (1983).

"Unreasonably dangerous" is defined as requiring something beyond that contemplated by the ordinary and reasonable buyer, taking into account any special knowledge of the buyer concerning the characteristics, propensities, risks, dangers, and proper and improper uses of the product. *Purina Mills, Inc. v. Askins*, 317 Ark. 58, 875 S.W.2d 843 (1994).

For a case involving inadequate cattle feed to be correctly submitted to the jury on strict liability, the plaintiffs will have to offer proof that the feed was in a defective condition which rendered it unreasonably dangerous and that the defective condition was a proximate cause of harm to the cattle; the possibility that manufactured feed for livestock might not contain the nutritional constituents recited on its labels, or that such levels might be af-

fected by time, weather, or methods of storage, would hardly be beyond the contemplation of the ordinary buyer so as to constitute being "unreasonably dangerous." *Purina Mills, Inc. v. Askins*, 317 Ark. 58, 875 S.W.2d 843 (1994).

Plaintiff demonstrated that a saw with a sawdust sawpit was defective and unreasonably dangerous where plaintiff demonstrated that the door to the sawpit could be opened while the saw blade was still spinning; plaintiff's familiarity with the open and obvious danger of the saw did not bar her strict liability claim. *Buchanna v. Diehl Machine, Inc.*, 98 F.3d 366 (8th Cir. 1996).

In an action alleging that the use of pesticides in a home resulted in a child's multiple birth defects, the plaintiffs failed to show that the product was defective rendering it unreasonably dangerous and, therefore, summary judgment was properly granted to the defendants. *National Bank of Commerce v. Dow Chem. Co.*, 165 F.3d 602 (8th Cir. 1999), rehearing denied, — F.3d —, 1999 U.S. App. LEXIS 2546 (8th Cir. Feb. 16, 1999).

**Cited:** *Cockman v. Welder's Supply Co.*, 265 Ark. 612, 580 S.W.2d 455 (1979); *Ford Motor Credit Co. v. Harper*, 671 F.2d 1117 (8th Cir. 1982); *W.M. Bashlin Co. v. Smith*, 277 Ark. 406, 643 S.W.2d 526 (1982); *Pruitt v. Cargill, Inc.*, 284 Ark. 474, 683 S.W.2d 906 (1985); *Elk Corp. of Arkansas v. Builders Transport, Inc.*, 862 F.2d 663 (8th Cir. 1988); *Kirkendall v. Harbor Ins. Co.*, 698 F. Supp. 768 (W.D. Ark. 1988); *Davis v. DuPont*, 729 F. Supp. 652 (E.D. Ark. 1989); *Rogers v. Armstrong World Indus., Inc.*, 744 F. Supp. 901 (E.D. Ark. 1990); *Bushong v. Garman Co.*, 311 Ark. 228, 843 S.W.2d 807 (1992); *Boerner v. Brown & Williamson Tobacco Corp.*, 260 F.3d 837 (8th Cir. 2001); *Harrell v. Madison County Miss. Mote Co.*, 370 F.3d 760 (8th Cir. 2004).

### **4-86-103. Unsolicited merchandise.**

When unsolicited merchandise is delivered in this state to the person for whom it is intended, the person shall have a right to refuse to accept delivery of this merchandise, or may deem the merchandise to be a gift and use it or dispose of it in any manner he or she chooses without obligation to the sender.

**History.** Acts 1969, No. 47, § 1; A.S.A. 1947, § 85-2-606.1.

#### **4-86-104. Interest on deposits for freight and parcel delivery services.**

(a) Whenever any person, company, or corporation furnishing customers with freight or parcel delivery service shall require a deposit from the customer before the delivery service will be supplied to him or her, the person putting up the deposit shall receive interest annually on the deposit until it is returned to the customer, provided all bills due for services furnished have been paid by the customer.

(b) The annual rate of interest shall be ten percent (10%) per year and shall be paid on or before December 31 of each year.

**History.** Acts 1991, No. 422, §§ 1, 2.

#### **4-86-105. Grave markers or headstones.**

When any person purchases a grave marker or grave headstone from any seller in this state, the seller shall advise the purchaser that if the deceased is a veteran of the armed forces of the United States, the purchaser may request that the word "VET" be inscribed in the upper left corner of the marker or stone.

**History.** Acts 1995, No. 932, § 1.

#### **4-86-106. Automatic renewal of professional home security contracts prohibited.**

(a) Except as provided in subsection (c) of this section, no professional home security services contract that is entered into after August 1, 2003, shall state that the term of the professional home security services contract will automatically be renewed for any additional period beyond the initial term of the professional home security services contract.

(b) Except as provided in subsection (c) of this section, no professional home security services contract under subsection (a) of this section shall be renewed for any additional period beyond the initial term of the professional home security services contract unless the person receiving the professional home security services affirmatively notifies the person offering the professional home security services that he or she wishes to renew the professional home security services contract.

(c)(1) A provider of professional home security services and a person may enter into a professional home security services contract that has a fixed initial term and successive, automatic monthly renewal terms.

(2) If the professional home security services contract contains a renewal clause as described in subdivision (c)(1) of this section, then:

(A) The professional home security services contract shall conspicuously state that the person receiving the professional home

security services has the right without additional cost or penalty to terminate the professional home security services contract at the end of the initial term or the then current renewal; and

(B) The person shall provide the provider of the professional home security services with notice of his or her intent to terminate by written notice at least thirty (30) days before the expiration of the initial term or the then current renewal term.

(d) This section does not affect the initial term of a professional home security services contract under subsection (a) of this section and does not prohibit any person from offering to renew a professional home security services contract under subsection (a) of this section.

(e) If a professional home security services contract under this section is renewed in violation of this section, the person receiving the professional home security services may without additional cost or penalty immediately terminate the professional home security services contract by giving a written termination notice to the provider and shall not be obligated to perform under the professional home security services contract as renewed.

**History.** Acts 2003, No. 1344, § 1;  
2007, No. 439, § 1.

#### **4-86-107. Prohibiting the misappropriation of social security numbers.**

(a) As used in this section:

(1) “Person” means:

- (A) An individual;
- (B) A corporation;
- (C) A partnership;
- (D) An organization; or
- (E) Any other entity; and

(2) “Publicly post” or “publicly display” means to intentionally communicate or otherwise make available to the general public.

(b) Except as provided in subsection (c) of this section, a person may not do any of the following:

(1) Publicly post or publicly display in any manner an individual’s social security number;

(2) Print an individual’s social security number on any card required for the individual to access products or services provided by the person or entity;

(3) Print an individual’s social security number:

- (A) On a postcard or other mailer not requiring an envelope; or
- (B) In a manner in which the social security number is visible on an envelope or without the envelope’s being opened; or

(4) Require an individual to transmit his or her social security number over the Internet unless the:

- (A) Connection is secure; or
- (B) Social security number is encrypted.

(c) This section does not prevent the collection, use, or release of a social security number:

- (1) As required or explicitly authorized by federal or state law; or
- (2) Pursuant to state or federal court rules.

(d) This section does not apply to an entity providing an electronic communications service to the public that is used by another person to violate this section unless the entity:

- (1) Conspires with another person to violate this section; or
- (2) Intentionally aids and abets another person in the violation of this section.

(e) This section shall not be asserted as a means to avoid compliance with an otherwise valid request for records pursuant to the Freedom of Information Act of 1967, § 25-19-101 et seq.

(f) The Attorney General may:

- (1) Bring suit against any person for violating the provisions of this section;
- (2) Collect civil penalties of up to two hundred fifty dollars (\$250) per violation along with attorney's fees and costs incurred in the investigation and prosecution of the matter; and
- (3) Seek appropriate injunctive relief.

**History.** Acts 2005, No. 1295, § 1.

**Effective Dates.** As enacted by Acts 2005, No. 1295, § 1, this section contained a subsection (g) which provided: "This

section shall become effective on January 1, 2007, and apply to acts occurring on or after January 1, 2007."

#### 4-86-108. [Repealed.]

**Publisher's Note.** This section, concerning distribution of drug samples, was repealed by Acts 2011, No. 719, § 2. The

section was derived from Acts 2009, No. 943, § 1.

## CHAPTER 87

### ARKANSAS EQUAL CONSUMER CREDIT ACT

#### SECTION.

4-87-101. Title.

4-87-102. Statute of limitations.

4-87-103. Class actions prohibited.

#### SECTION.

4-87-104. Discrimination based on sex or marital status unlawful.

4-87-105. Damages.

#### 4-87-101. Title.

This chapter shall be known and may be cited as the "Arkansas Equal Consumer Credit Act of 1975".

**History.** Acts 1975, No. 566, § 1; A.S.A. 1947, § 70-925.

**4-87-102. Statute of limitations.**

Any action brought under the provisions of this chapter may be brought in any court of competent jurisdiction in this state during a period of one (1) year commencing on the date of occurrence of the violation.

**History.** Acts 1975, No. 566, § 4; A.S.A. 1947, § 70-928.

**4-87-103. Class actions prohibited.**

No class action may be filed under the provisions of this chapter.

**History.** Acts 1975, No. 566, § 5; A.S.A. 1947, § 70-929.

**4-87-104. Discrimination based on sex or marital status unlawful.**

It shall be unlawful for any creditor or credit card issuer to discriminate between equally qualified individuals solely on the basis of sex or marital status with respect to the approval or denial of terms of credit in connection with any consumer credit sale whether or not under an open-end credit plan, consumer loan, or any other extension of consumer credit, or with respect to the issuance, renewal, denial, or terms of any credit card.

**History.** Acts 1975, No. 566, § 2; A.S.A. 1947, § 70-926.

**RESEARCH REFERENCES**

<b>U. Ark. Little Rock L.J.</b> Notes, Civil Rights — Marital Status Discrimination — Refusing to Rent to Unmarried Cohabitants is Not Unlawful Marital Status Dis-	crimination Under the Minnesota Human Rights Act. State ex rel. Cooper v. French, 460 N.W.2d 2 (Minn. 1990), 13 U. Ark. Little Rock L.J. 653.
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**4-87-105. Damages.**

Any creditor or credit card issuer who discriminates against any individual in a manner prohibited by § 4-87-104 is liable to the individual for damages in an amount equal to the sum of:

(1) In a successful action to enforce the provisions of this chapter, not less than one hundred dollars (\$100) nor more than five hundred dollars (\$500); and

(2) In the case of any successful action to enforce the foregoing liability, the costs of the action together with a reasonable attorney's fee as determined by the court.

**History.** Acts 1975, No. 566, § 3; A.S.A. 1947, § 70-927.

## RESEARCH REFERENCES

**Ark. L. Rev.** Speed, Attorney's Fees Awards in Federal Court: An Arkansas Study, 39 Ark. L. Rev. 99.

## CHAPTER 88

## DECEPTIVE TRADE PRACTICES

## SUBCHAPTER.

1. GENERAL PROVISIONS.
2. ENHANCED PENALTIES WHEN ELDER OR DISABLED PERSONS ARE TARGETED.
3. PROTECTION OF CONSUMERS FROM PRICE GOUGING AND UNFAIR PRICING PRACTICES DURING AND SHORTLY AFTER A STATE OF EMERGENCY.
4. "SLAMMING" IN THE TELECOMMUNICATIONS INDUSTRY.
5. DISCLOSURES BY SOLICITORS FOR ADVERTISEMENTS ON SCHOOL CALENDARS.
6. UNSOLICITED COMMERCIAL AND SEXUALLY EXPLICIT ELECTRONIC MAIL PREVENTION ACT.
7. FAIR GIFT CARD ACT.
8. FAIR DISCLOSURE OF STATE FUNDED PAYMENTS FOR PHARMACISTS' SERVICES ACT.

**Preambles.** Acts 1971, No. 92 contained a preamble which read:

"Whereas, the public health, welfare, and interest require a strong and effective consumer protection program to protect the interests of both the consumer public and the legitimate business community; and

"Whereas, a Consumer Protection Division of the Attorney General's Office is needed to coordinate services offered to

the consumer by various State and Local Agencies, together with private organizations; for the purpose of developing and providing preventative and remedial programs affecting the interest of the consumer public ...."

**Cross References.** Transfer of credit card debt, § 4-107-201 et seq.

**Effective Dates.** Acts 1971, No. 92, § 15: July 1, 1971.

## RESEARCH REFERENCES

**ALR.** Failure to deliver ordered merchandise to customer on date promised as unfair or deceptive trade practice. 7 A.L.R.4th 1257.

Finance company's liability in connection with consumer fraud practice of party selling goods or services. 18 A.L.R.4th 824.

Award of attorneys' fees in actions under state deceptive trade practice and consumer protection acts. 35 A.L.R.4th 12.

"Fraudulent" or "unconscionable" agreement or conduct within meaning of state consumer credit protection act. 42 A.L.R.4th 293.

Impugning quality or worth of merchandise or products. 42 A.L.R.4th 318.

Implied warranty coverage for service

transactions under state consumer protection and deceptive trade statutes. 72 A.L.R.4th 282.

Constitutional right to jury trial in cause of action under state unfair or deceptive trade practices law. 54 A.L.R.5th 631.

**Am. Jur.** 17 Am. Jur. 2d, Con. & Borr. Prot., §§ 280-305.

**Ark. L. Rev.** Legislative Note — Act 462 of 1973: Three Day "Cooling-Off" Period for Home Solicitation Sales, 27 Ark. L. Rev. 571.

Kershen, Horse-Tradin': Legal Implications of Livestock Auction Bidding Practices, 37 Ark. L. Rev. 119.

## CASE NOTES

**Cited:** Lenders Title Co. v. Chandler, Abstract & Title Co. v. Rice, 358 Ark. 1, 358 Ark. 66, 186 S.W.3d 695 (2004); Am. 186 S.W.3d 705 (2004).

## SUBCHAPTER 1 — GENERAL PROVISIONS

## SECTION.

- 4-88-101. Applicability of chapter.
- 4-88-102. Definitions.
- 4-88-103. Penalties.
- 4-88-104. Injunctions.
- 4-88-105. Consumer Protection Division.
- 4-88-106. Consumer Advisory Board.
- 4-88-107. Deceptive and unconscionable trade practices generally.
- 4-88-108. Concealment, suppression, or omission of material facts.
- 4-88-109. Pyramiding devices.

## SECTION.

- 4-88-110. [Repealed.]
- 4-88-111. Investigations — Procedure — Confidential information.
- 4-88-112. Failure to cooperate in investigations — Proceedings.
- 4-88-113. Civil enforcement and remedies — Suspension or forfeiture of charter, franchise, etc.
- 4-88-114. Voluntary compliance.
- 4-88-115. Statute of limitations.

**Cross References.** Penalties for violations of requirements for solitors for advertisements on school calendars, § 4-88-503.

**Effective Dates.** Acts 1997, No. 250, § 258: Feb. 24, 1997. Emergency clause provided: "It is hereby found and determined by the General Assembly that Act 1211 of 1995 established the procedure for all state boards and commissions to follow regarding reimbursement of expenses and stipends for board members; that this act amends various sections of the Arkansas Code which are in conflict with the Act 1211 of 1995; and that until this cleanup

act becomes effective conflicting laws will exist. Therefore an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

## 4-88-101. Applicability of chapter.

This chapter does not apply to:

- (1) Advertising or practices which are subject to and which comply with any rule, order, or statute administered by the Federal Trade Commission;
- (2) Broadcasters, printers, publishers, and other persons engaging in the dissemination of information who do not have actual knowledge of the intent, design, purpose, or deceptive nature of the advertising or practice;
- (3) Actions or transactions permitted under laws administered by the Insurance Commissioner, the Securities Commissioner, the State

Highway Commission, the Bank Commissioner, or other regulatory body or officer acting under statutory authority of this state or the United States, unless a director of these divisions specifically requests the Attorney General to implement the powers of this chapter; or

(4) Actions or transactions of a public utility which have been authorized by the Arkansas Public Service Commission, a municipal authority, the Federal Energy Regulatory Commission, the Federal Communications Commission, or other regulatory body or officer acting under statutory authority of the United States.

**History.** Acts 1971, No. 92, § 13; A.S.A. 1947, § 70-913; Acts 1991, No. 1177, § 3; 1995, No. 836, § 6.

## RESEARCH REFERENCES

**U. Ark. Little Rock L. Rev.** Resolving the Circuit Split on Standing in False Advertising Claims and Incorporation of Prudential Standing in State Deceptive

Trade Practices Law: The Quest for Optimal Levels of Accurate Information in the Marketplace, 29 U. Ark. Little Rock L. Rev. 283.

## CASE NOTES

### ANALYSIS

Applicability.

Arbitration.

Consumer Protection Acts.

Practice of Law.

### Applicability.

Appellate court would not decide the issue of whether this section applied to a company's actions in the state where the company's actions were also the subject of a Federal Trade Commission order; the appellate court did not consider issues of jurisdiction in an appeal that arose out of the issuance of a preliminary injunction. *Mercury Mktg. Techs. of Del., Inc. v. State ex rel. Beebe*, 358 Ark. 319, 189 S.W.3d 414 (2004).

Plaintiff's motion to dismiss defendant's Arkansas Deceptive Trade Practices Act (ADTPA) claim on the ground that the ADTPA was not cognizable because defendant was not a consumer was denied because one did not have to be a consumer to recover under the ADTPA pursuant to this section, and §§ 4-88-102(5) and 4-88-113(f). *Valor Healthcare, Inc. v. Pinkerton*, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 105988 (W.D. Ark. Dec. 23, 2008).

Self-regulating national securities dealer association and its investigatory

and disciplinary arm properly removed an Arkansas corporation's suit from state court pursuant to 28 U.S.C.S. § 1441(b) because although the corporation purported to seek relief solely under the Arkansas Deceptive Trade Practices Act (ADTPA), its claims actually arose under federal law: (1) the corporation filed its suit after it was investigated for alleged security law violations; (2) the corporation alleged that the association and its arm violated the ADTPA by issuing fraudulent securities registrations to undercover investigators and by taking other actions to make it appear that those registrations were legitimate; (3) Ninth Circuit precedent held that 15 U.S.C.S. § 78aa vested exclusive jurisdiction in the federal courts as to claims arising under the Securities Exchange Act of 1934 (Exchange Act), and (4) the corporation's claims clearly arose under the Exchange Act because the association acted pursuant to 15 U.S.C.S. § 78o in issuing the registrations to the undercover investigators. *Shimoda-Atlantic, Inc. v. Fin. Indus. Regulatory Auth., Inc.*, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 37900 (W.D. Ark. May 8, 2008).

Both the preamble to the Arkansas Deceptive Trade Practices Act (ADTPA), §§ 4-88-101 to 4-88-503, and the activities that the ADTPA makes unlawful show

that the ADTPA protects consumers from unfair ways of doing business: (1) the application of the ADTPA is limited to trade practices; (2) "unconscionable" conduct prohibited by the ADTPA must be considered in light of trade practices; and (3) there is nothing in the ADTPA that supports the conclusion that the ADTPA protects consumers against third party criminal conduct. *Independence County v. Pfizer, Inc.*, 534 F. Supp. 2d 882 (E.D. Ark. 2008), *aff'd*, *Ashley County v. Pfizer*, 552 F.3d 659 (8th Cir. 2009).

### Arbitration.

Farm owners' claims against a poultry processor for violation of the Arkansas Deceptive Trade Practices Act, § 4-88-101 et seq., were arbitrable under a broad arbitration clause contained in an agreement between the parties; an Arkansas choice-of-law provision in the agreement did not require application of § 16-108-230(b)(1) of the Arkansas Uniform Arbitration Act, under which contractual arbitration provisions did not apply to tort claims. An arbitration panel did not violate 9 U.S.C.S. § 10(a)(3) or (4) of the Federal Arbitration Act and did not manifestly disregard the law by finding that the owners' tort claims were barred by res judicata; the tort claims could have been litigated in a prior arbitration. *Hudson v. Conagra Poultry Co.*, 484 F.3d 496 (8th Cir. 2007).

District court properly ruled that it could determine the threshold question of whether a customer's Arkansas Deceptive Trade Practices Act, § 4-88-101 et seq., claims were subject to arbitration pursuant to the terms of the customer's service agreement. Although the customer's challenge to the validity of the arbitration provision was a "claim" arising from the agreement and, thus, was covered by the arbitration provision, the provision also contained an exemption for certain disputes, the challenge to the validity of the arbitration provision was an exempted "dispute," and the exemption overrode other language that stated that arbitrations would be conducted under American Arbitration Association rules, which gave arbitrators the authority to determine the arbitrability of claims. *Enderlin v. XM Satellite Radio Holdings*, 483 F.3d 559 (8th Cir. 2007).

District court erred when it denied the 9 U.S.C.S. § 4 motion to compel arbitration

filed by a creditor's assignees: (1) the district court properly addressed in the first instance whether the creditor's assignment of a consumer's credit card agreement was valid, which was a precondition for making the assignees a party to the agreement; (2) the district court erred in concluding that the assignment was invalid because the consumer had purportedly paid the full amount owed on her credit card account before the assignment took place; (3) even if she had settled her debt as she claimed, that did not release the consumer from her obligations under the agreement, including her obligation to arbitrate disputes arising out of the agreement; (4) the consumer's continuing obligations under the agreement gave the creditor a present, assignable interest in the agreement even after the consumer settled her debt; (5) the agreement's arbitration provision broadly covered any claim, dispute, or controversy arising from or related to the agreement; and (6) the debtor could be compelled to arbitrate her Fair Debt Collection Practices Act and the Arkansas Deceptive Trade Practices Act claims because those claims were based on the assignees' alleged efforts to collect on the consumer's already-paid debt, and disputes over the collection of debts incurred under the agreement constituted controversies arising from or related to the agreement. *Koch v. Compucredit Corp.*, 543 F.3d 460 (8th Cir. 2008).

### Consumer Protection Acts.

Where the complaint alleged that the defendants violated the Consumer Protection Acts by selling the co-op demand notes by means of misrepresentations, this section was not applicable. *Robertson v. White*, 633 F. Supp. 954 (W.D. Ark. 1986). But see *Reves v. Ernst & Young*, 494 U.S. 56, 110 S. Ct. 945, 108 L. Ed. 2d 47 (1990), rehearing denied, 494 U.S. 1092, 110 S. Ct. 1840, 108 L. Ed. 2d 968 (1990).

In a class action suit against a check-cashing business and its corporate officers, the trial court did not err in piercing the corporate veil and holding the officers individually liable as they failed to properly maintain business records, thereby failing to comply with § 23-52-112(a) [repealed] of the Arkansas Check Cashers' Act. *Anderson v. Stewart*, 366 Ark. 203, 234 S.W.3d 295 (2006).

### Practice of Law.

Trial court properly dismissed the complaint with prejudice because the Arkansas Deceptive Trade Practices Act, as codified in this section, did not apply to the practice of law, and the Arkansas Supreme Court made rules regulating the practice of law and that responsibility could not be discharged if it were dependent upon or controlled by statutes enacted by the Arkansas General Assembly; the attorney agreed to represent the husband in the medical malpractice action,

which was dismissed with prejudice because the attorney was not authorized to practice law in Arkansas. *Preston v. Stoops*, 373 Ark. 591, 285 S.W.3d 606 (2008).

Dismissal of a claim under the Arkansas Deceptive Trade Practices Act (ADTPA), § 4-88-101 et seq., was proper in an action by debtors against a law firm acting as a debt collector because the ADTPA did not apply to the practice of law. *Born v. Hosto & Buchan, PLLC*, 2010 Ark. 292, — S.W.3d — (2010).

### 4-88-102. Definitions.

As used in this subchapter:

(1) “Caller identification service” means a service offered by a telecommunications provider that provides caller identification information to a device capable of displaying the information;

(2) “Charitable organization” means any benevolent, philanthropic, patriotic, civic, or eleemosynary person;

(3) “Contribution” means the promise or grant of any money or property of any kind or value;

(4) “Goods” means any tangible property, coupons, or certificates, whether bought or leased;

(5) “Person” means an individual, organization, group, association, partnership, corporation, or any combination of them;

(6) “Promotion” means, for each charitable organization represented, each and every fundraising drive or campaign for which contributions are solicited. Similar or identical promotions on behalf of different charitable organizations constitute separate and distinct promotions;

(7) “Services” means work, labor, or other things purchased that do not have physical characteristics; and

(8) “Solicitation” means each request for a contribution.

**History.** Acts 1991, No. 1177, § 3; 1993, No. 587, § 1; 2003, No. 1465, § 1.

**A.C.R.C. Notes.** Former § 4-88-102 was renumbered as § 4-88-103.

### RESEARCH REFERENCES

**U. Ark. Little Rock L. Rev.** Survey of Legislation, 2003 Arkansas General As-

sembly, Business Law, 26 U. Ark. Little Rock L. Rev. 351.

### CASE NOTES

#### Person.

Plaintiff’s motion to dismiss defendant’s Arkansas Deceptive Trade Practices Act (ADTPA) claim on the ground that the ADTPA was not cognizable because defendant was not a consumer was denied be-

cause one did not have to be a consumer to recover under the ADTPA pursuant to §§ 4-88-101, 4-88-113(f) or subdivision (5) of this section, only a person who suffers actual damage or injury as a result of an offense or violation. *Valor Healthcare, Inc.*

v. Pinkerton, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 105988 (W.D. Ark. Dec. 23, 2008).

#### 4-88-103. Penalties.

Any person who knowingly and willfully commits an unlawful practice under this chapter shall be guilty of a Class A misdemeanor.

**History.** Acts 1971, No. 92, § 7; A.S.A. 1947, § 70-907; Acts 1991, No. 1177, § 3. merly codified as § 4-88-102. Former § 4-88-103 was renumbered as § 4-88-104.

**A.C.R.C. Notes.** This section was for-

#### CASE NOTES

**Cited:** Stein v. Lukas, 308 Ark. 74, 823 S.W.2d 832 (1992).

#### 4-88-104. Injunctions.

In addition to the criminal penalty imposed hereunder, the Attorney General of this state shall have authority, acting through the Consumer Counsel, to file an action in the court designated in § 4-88-112 for civil enforcement of the provisions of this chapter, including, but not limited to, the seeking of restitution and the seeking of an injunction prohibiting any person from engaging in any deceptive or unlawful practice prohibited by this chapter.

**History.** Acts 1971, No. 92, § 8; A.S.A. 1947, § 70-908; Acts 1991, No. 1177, § 3; 1995, No. 836, § 1. merly codified as § 4-88-103. Former § 4-88-104 has been renumbered as § 4-88-105.

**A.C.R.C. Notes.** This section was for-

#### 4-88-105. Consumer Protection Division.

(a) There is created within the office of the Attorney General a Consumer Protection Division.

(b) The director of this division shall be known as the Consumer Counsel of Arkansas and shall be appointed by the Attorney General who may also appoint such assistants, investigators, and professional and clerical staff as are necessary for the efficient operation of the division.

(c) The division shall represent and protect the state, its subdivisions, the legitimate business community, and the general public as consumers.

(d) The division shall have the following functions, powers, and duties:

(1) To serve as a central coordinating agency and clearinghouse for receiving complaints of illegal, fraudulent, or deceptive practices;

(2) To assist, advise, and cooperate with federal, state, and local agencies and officials to protect and promote the interests of the consumer public;

(3) To conduct investigations, research, studies, and analyses of matters, to issue reports, and take appropriate action affecting the interests of consumers, which may include the referral of complaints to state and local departments or agencies charged with enforcement of consumer laws, or to private organizations and agencies; however, the division may retain jurisdiction over such matters until resolved;

(4) To promote consumer education and to undertake activities to encourage business and industry to maintain high standards of honesty, fair business practices, and public responsibility in the production, advertisement, and sale of consumer goods and services, encouraging and supporting activities directed toward these objectives by the Better Business Bureau, consumer organizations, and other associations of like nature;

(5) To investigate violations of laws enacted and rules and regulations promulgated for the purpose of consumer protection, and to study the operation of such laws, rules, and regulations and to recommend to the General Assembly needed changes in law in the consumer's interest; and

(6) To enforce the provisions of this chapter and to perform such other functions as may be incidental to the powers and duties set forth in this chapter.

(e) The expenses of the division shall be paid from funds provided for that purpose by law; including, without limiting the generality of the foregoing, funds made available by the state or by the United States, or by political subdivisions or agencies thereof.

**History.** Acts 1971, No. 92, §§ 1, 2, 12; A.S.A. 1947, §§ 70-901, 70-902, 70-912; Acts 1991, No. 1177, § 3. merly codified as § 4-88-104. Former § 4-88-105 has been renumbered as § 4-88-106.

**A.C.R.C. Notes.** This section was for-

#### CASE NOTES

**Cited:** Hubbard v. Moore, 537 F. Supp. 126 (W.D. Ark. 1982).

#### 4-88-106. Consumer Advisory Board.

(a) There may be a Consumer Advisory Board appointed by the Attorney General.

(b)(1) If the Attorney General appoints such a board, it shall consist of eleven (11) members serving terms of two (2) years.

(2) The membership of the board shall be fairly representative of consumers, manufacturers, the Better Business Bureau, labor organizations, retailers, agriculture, and trade and professional associations.

(3) Each member shall serve without pay, but may be reimbursed for expenses in accordance with § 25-16-901 et seq.

(c) The chairman of the board shall be elected by the members.

(d) The board may assist and advise the Consumer Counsel with respect to:

- (1) Policy matters relating to consumer interests;
- (2) Improvement in the effectiveness of state consumer programs and operations;
- (3) Needed changes in law to improve consumer protection in Arkansas.

**History.** Acts 1971, No. 92, § 3; A.S.A. 1947, § 70-903; Acts 1991, No. 1177, § 3; 1997, No. 250, § 11. merly codified as § 4-88-105. Former § 4-88-106 has been renumbered as § 4-88-107.

**A.C.R.C. Notes.** This section was for-

#### **4-88-107. Deceptive and unconscionable trade practices generally.**

(a) Deceptive and unconscionable trade practices made unlawful and prohibited by this chapter include, but are not limited to, the following:

(1) Knowingly making a false representation as to the characteristics, ingredients, uses, benefits, alterations, source, sponsorship, approval, or certification of goods or services or as to whether goods are original or new or of a particular standard, quality, grade, style, or model;

(2) Disparaging the goods, services, or business of another by false or misleading representation of fact;

(3) Advertising the goods or services with the intent not to sell them as advertised;

(4) Refusal of a retailer to deliver to a customer purchasing any electronic or mechanical apparatus the record of warranty and statement of service availability which the manufacturer includes in the original carton or container of the product or the refusal to make available on request information relating thereto;

(5) The employment of bait-and-switch advertising consisting of an attractive but insincere offer to sell a product or service which the seller in truth does not intend or desire to sell, evidenced by:

(A) A refusal to show or a disparagement of the advertised product;

(B) The requirement of a tie-in sale or other undisclosed conditions precedent to the purchase;

(C) A demonstration of a defective product; or

(D) Other acts demonstrating an intent not to sell the advertised product or services;

(6) Knowingly failing to identify flood, water, fire, or accidentally damaged goods as to such damages;

(7) Making a false representation that contributions solicited for charitable purposes shall be spent in a specific manner or for specified purposes;

(8) Knowingly taking advantage of a consumer who is reasonably unable to protect his or her interest because of:

(A) Physical infirmity;

(B) Ignorance;

(C) Illiteracy;

- (D) Inability to understand the language of the agreement; or  
 (E) A similar factor;

(9) The offering for sale, assembly, or drafting of any trust document, including a living trust, by a nonlawyer, excluding the marketing, assembly, and funding by bank trust departments and trust companies;

(10) Engaging in any other unconscionable, false, or deceptive act or practice in business, commerce, or trade; and

(11)(A) Displaying or causing to be displayed a fictitious or misleading name or telephone number on an Arkansas resident's telephone caller identification service.

(B) Subdivision (a)(11)(A) of this section does not apply to the transmission of a caller identification service by a telecommunications provider.

(b) The deceptive and unconscionable trade practices listed in this section are in addition to and do not limit the types of unfair trade practices actionable at common law or under other statutes of this state.

**History.** Acts 1971, No. 92, § 6; A.S.A. 1947, § 70-906; Acts 1991, No. 1177, § 3; 1993, No. 587, § 2; 1995, No. 1306, § 1; 2003, No. 1465, § 2.

**A.C.R.C. Notes.** This section was formerly codified as § 4-88-106. Former § 4-88-107 has been renumbered as § 4-88-108.

## RESEARCH REFERENCES

**ALR.** World wide web domain as violating state trademark protection statute or state unfair trade practices act. 96 A.L.R.5th 1.

**Ark. L. Rev.** Recent Development: Trade Regulation — Procedure, 58 Ark. L. Rev. 1005.

**U. Ark. Little Rock L. Rev.** Survey of Legislation, 2003 Arkansas General Assembly, Business Law, 26 U. Ark. Little Rock L. Rev. 351.

## CASE NOTES

### ANALYSIS

In General.  
 Any Other Deceptive Act or Practice.  
 Application.  
 Elements of Claim.  
 Jury Instructions.  
 Scope.  
 Standing.  
 Unconscionable Conduct.

### In General.

The Deceptive Trade Practices Act protects consumers and promotes the purposes of the Arkansas Constitution, Art. 19, § 13, by making its provisions effective for consumers who are not likely to have financial means to obtain legal assistance and who are unlikely to be aware of

their legal rights to bring individual actions. State ex rel. Bryant v. R & A Inv. Co., 336 Ark. 289, 985 S.W.2d 299 (1999).

Although the parent corporation's name and logo appeared on the master agreement that was executed between contractor and subsidiary company, the fact remained that the parties to the contract were clearly stated and that the contractor chose to make the assumption, without further investigation on his part, that subsidiary company was financially backed by the parent corporation, which subsequently sold its stock to a corporation that went bankrupt; the use of parent corporation's logo and company name by the subsidiary alone was not a deceptive trade practice. Little Rock Elec. Contrac-

tors, Inc. v. Entergy Corp., 79 Ark. App. 337, 87 S.W.3d 842 (2002).

Section 4-88-113 limits a private cause of action for deceptive trade practices under this section to instances where actual damage or injury has occurred; hence, where the only alleged injury is the diminution in value of a product, a private cause of action is not cognizable. Wallis v. Ford Motor Co., 362 Ark. 317, 208 S.W.3d 153 (2005).

Health services company's policy which denied privileges to doctors that acquired or held an interest in a competitor hospital constituted a violation of the Arkansas Deceptive Trade Practices Act, and such a violation may satisfy the impropriety requirement for a claim of tortious interference; subdivision (a)(10) of this section makes illegal any trade practice which is unconscionable and includes conduct violative of public policy or statute. Baptist Health v. Murphy, 365 Ark. 115, 226 S.W.3d 800 (2006).

#### **Any Other Deceptive Act or Practice.**

Subsection (a)(10) is not too vague for enforcement. State ex rel. Bryant v. R & A Inv. Co., 336 Ark. 289, 985 S.W.2d 299 (1999).

A title-pawn corporation violated subsection (a)(10) where (1) it required borrowers to surrender their car titles as security for repayment and pay monthly interest, or a monthly pawn charge, (2) the monthly interest was typically equal to 25 percent of the entire loan amount each month that the loan was not paid in full, and which constituted an annual percentage rate of 304.17 percent, (3) the corporation's contracts further provided that upon the borrower's default, it had the right to take whatever steps may be necessary to take possession thereof at the borrower's risk and expense, and (4) borrowers were required to sign a power of attorney, allowing the corporation to sell the vehicle upon repossession. State ex rel. Bryant v. R & A Inv. Co., 336 Ark. 289, 985 S.W.2d 299 (1999).

Plaintiff's claims regarding violations of Telephonic Sellers Act and School Calendar Act were actionable under the Arkansas Deceptive Trade Practices Act, even though neither Act provided a private cause of action for consumers because a violation of either statute constituted a deceptive trade practice under the ADTPA

pursuant to §§ 4-88-503(a), 4-99-111(b), and any person who suffered actual damage as a result of such a practice had a cause of action under the ADTPA, § 4-88-113(f). M.S. Wholesale Plumbing, Inc. v. Univ. Sports Pubs. Co., Inc., — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 4159 (E.D. Ark. Jan. 7, 2008).

#### **Application.**

Grant of summary judgment in favor of the employer in the employee's action alleging that he was fired for reporting inhumane workplace conditions was appropriate because the appellate court was unable to interpret subdivision (a)(1) of this section as applying to the employer's statements in its annual report about its factory-certification process, even if the employee's factual allegations were accepted as true. The employee simply failed to show a nexus between his reports of problems with the factory-certification process and any public policy of Arkansas; and, even if the employee's allegations did implicate public policy, his admitted violation of the employer's fraternization policy provided independent, sufficient grounds for his termination. Lynn v. Wal-Mart Stores, Inc., 102 Ark. App. 65, 280 S.W.3d 574 (2008).

#### **Elements of Claim.**

Plaintiff's false representation/unfair competition claim under subdivision (a)(1) of this section, arising from the fact that defendant had begun using the same name that it used for its informal hunting club, failed as a matter of law because plaintiff did not offer any evidence showing that it suffered any actual damage or injury as a result of defendant's actions, which pursuant to § 4-88-113(f) was a necessary element of plaintiff's Arkansas Deceptive Trade Practices Act claim. Ark. Trophy Hunters Ass'n v. Tex. Trophy Hunters Ass'n, 506 F. Supp. 2d 277 (W.D. Ark. 2007).

Consumers sufficiently alleged specific deceptive statements or omissions made by a refrigerator manufacturer, which was necessary to assert actionable claims under the Arkansas Deceptive Trade Practices Act, subdivision (a)(10) of this section and § 4-88-108(2). The consumers alleged: (1) that the manufacturer knew of defects in its refrigerators, which defects were a material fact; (2) the manufacturer

failed to disclose that material fact to the public, knowing that its failure to do so would tend to deceive the public and cause them to purchase its refrigerators; (3) the manufacturer failed to disclose the defects with the intent of having the public rely on its omission to purchase its refrigerators; and (4) the consumers suffered an injury because they relied on the manufacturer's omission and would not have purchased its refrigerators if the defects had been disclosed. *Rush v. Whirlpool Corp.*, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 17210 (W.D. Ark. Feb. 22, 2008).

Claims stated by the contractor in Count I constituted ordinary breach-of-contract claims that did not rise to the level of violating the Arkansas Deceptive Trade Practices Act, §§ 4-88-101 to 4-88-503, as they were devoid of any factual bases on which the appellate court could conclude that the subcontractor engaged in deceptive business practices. *CEI Eng'g Assocs. v. Elder Constr. Co.*, 2009 Ark. App. 259, 306 S.W.3d 447 (2009).

Subdivision (a)(10) of this section and § 4-88-108(2) did not require knowing or intentional deception, and subdivision (a)(10) listed deception as unlawful, and since omitting an installation requirement from defendant supplier's rebate documents could be a deceptive trade practice, plaintiff retailer's claims under those sections, alleging the retailer lost profits and was forced to issue its own rebates to customers due to the supplier's refusal to honor its rebate program for the retailer's customers, should have survived summary judgment. *Curtis Lumber Co. v. La. Pac. Corp.*, 618 F.3d 762 (8th Cir. 2010).

State-of-mind requirement for claims under subdivisions (a)(1), (3), and (5) of this section mirrored that of fraud, and thus, where plaintiff retailer alleged defendant supplier refused to honor its rebate program for the retailer's customers, but there was no evidence of fraudulent intent, and the fact that the supplier established and followed procedures for processing rebate applications in nearly all other instances showed no fraudulent scheme at work, those claims failed. *Curtis Lumber Co. v. La. Pac. Corp.*, 618 F.3d 762 (8th Cir. 2010).

Appellee alleged that appellant made false representations and that its actions were deceptive and unconscionable under

the Arkansas Deceptive Trade Practices Act. As appellee never explained what the false representations were or what acts appellant engaged in that violated the Act, and did not explain how it was damaged by appellant's actions, it failed to allege facts setting forth a cause of action under the Act. *Forever Green Ath. Fields, Inc. v. Lasiter Constr., Inc.*, 2011 Ark. App. 347, — S.W.3d — (2011).

### **Jury Instructions.**

Arkansas Model Jury Instruction 405 accurately stated the burden of proof required in a misrepresentation action. *McClard v. Crain Mgt. Group, Inc.*, 313 Ark. 472, 855 S.W.2d 929 (1993).

### **Scope.**

Even the most general catchall provision of the Arkansas Deceptive Trade Practices Act (ADTPA), making it unlawful to engage in any other unconscionable, false, or deceptive act or practice in business, commerce, or trade. By its terms, subdivision (a)(10) of this section requires that the conduct occur in connection with business, commerce, or trade, not in connection with litigation. Thus, an ADTPA counterclaim based on an employment agreement which first surfaced as an exhibit to plaintiffs' response to defendants' motion to dismiss, was dismissed. *Illumination Station, Inc. v. Cook*, — F. Supp. 2d —, 2007 U.S. Dist. LEXIS 89247 (W.D. Ark. Nov. 20, 2007).

Plaintiff's claim alleging a violation of the Arkansas Deceptive Trade Practices Act (ADTPA), subdivisions (a)(1) and (a)(10) of this section, was actionable because plaintiff had alleged sufficient facts to satisfy the ADTPA's actual damage requirement under § 4-88-113(f); plaintiff was not alleging that it purchased a product with less economic value than represented by defendant, but instead, plaintiff claimed that it paid for a product that was not at all what defendant represented, that is, an advertisement sold on behalf of a university. *M.S. Wholesale Plumbing, Inc. v. Univ. Sports Pubs. Co., Inc.*, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 4159 (E.D. Ark. Jan. 7, 2008).

### **Standing.**

The Attorney General has standing to enforce the provisions of the Deceptive Trade Practices Act. *State ex rel. Bryant v.*

R & A Inv. Co., 336 Ark. 289, 985 S.W.2d 299 (1999).

Trial court properly dismissed, for failure to state a claim, a class-action fraud and statutory deceptive trade practices lawsuit alleging that a concealed design defect caused a diminution in value of a vehicle; a private cause of action could not be maintained under this section because no actual damage or injury occurred within the meaning of § 4-88-113. *Wallis v. Ford Motor Co.*, 362 Ark. 317, 208 S.W.3d 153 (2005).

#### **Unconscionable Conduct.**

Arkansas counties could not pursue a private action under § 4-88-113(f) against companies that produced and marketed cold remedies containing ephedrine and pseudoephedrine, which were ingredients used in manufacturing methamphetamine (meth), because the counties failed to assert actionable claims under the Arkansas Deceptive Trade Practices Act (ADTPA), §§ 4-88-101 to 4-88-503: (1) the counties alleged that the companies engaged in unconscionable behavior under subdivision (a)(10) of this section, by fail-

ing to take action to prevent their remedies from being used to manufacture meth, by benefitting from that illegal use of their remedies, and by actively impeding measures to prevent the remedies from being used to manufacture meth; (2) the ADTPA was limited to trade practices and did not protect consumers or the counties against third party criminal conduct involving the use of the companies' remedies; (3) the counties could not show that the companies caused their financial injury because the companies did not have any special relationship with the counties that rendered them liable for the criminal acts of the meth manufactures; and (4) the counties could not seek relief under the ADTPA because there injury was too remote, as there was no direct link between the companies' remedies and their alleged financial injuries. *Independence County v. Pfizer, Inc.*, 534 F. Supp. 2d 882 (E.D. Ark. 2008), *aff'd*, *Ashley County v. Pfizer*, 552 F.3d 659 (8th Cir. 2009).

**Cited:** *New Equity Sec. Holders Comm. ex rel. Golden Gulf, Ltd. v. Phillips*, 97 B.R. 492 (E.D. Ark. 1989).

### **4-88-108. Concealment, suppression, or omission of material facts.**

When utilized in connection with the sale or advertisement of any goods, services, or charitable solicitation, the following shall be unlawful:

(1) The act, use, or employment by any person of any deception, fraud, or false pretense; or

(2) The concealment, suppression, or omission of any material fact with intent that others rely upon the concealment, suppression, or omission.

**History.** Acts 1971, No. 92, § 4; A.S.A. 1947, § 70-904; Acts 1991, No. 1177, § 3; 1995, No. 836, § 2.

**A.C.R.C. Notes.** This section was for-

merly codified as § 4-88-107. Former § 4-88-108 has been renumbered as § 4-88-109.

### **RESEARCH REFERENCES**

**ALR.** World wide web domain as violating state trademark protection statute or

state unfair trade practices act. 96 A.L.R.5th 1.

## CASE NOTES

## ANALYSIS

Purpose.  
Negligence.  
Omission.  
Scienter.

**Purpose.**

This section is not designed to regulate the lawyer-client or accountant-client relationship. *Robertson v. White*, 633 F. Supp. 954 (W.D. Ark. 1986). But see *Reves v. Ernst & Young*, 494 U.S. 56, 110 S. Ct. 945, 108 L. Ed. 2d 47 (1990), rehearing denied, 494 U.S. 1092, 110 S. Ct. 1840, 108 L. Ed. 2d 968 (1990).

**Negligence.**

A violation of this section, prohibiting the employment of any deception or the intentional concealment of a material fact in the sale or advertisement of goods, can be considered as evidence of negligence. *Berkeley Pump Co. v. Reed-Joseph Land Co.*, 279 Ark. 384, 653 S.W.2d 128 (1983).

**Omission.**

Ordinarily, absent affirmative fraud, a party, in order to hold another liable in fraud (as opposed to breach of implied warranty), must seek out the information he desired and may not omit inquiry and examination and then complain that the other did not volunteer information. *Berkeley Pump Co. v. Reed-Joseph Land Co.*, 279 Ark. 384, 653 S.W.2d 128 (1983).

Consumers sufficiently alleged specific deceptive statements or omissions made by a refrigerator manufacturer, which was necessary to assert actionable claims under the Arkansas Deceptive Trade Practices Act, § 4-88-107(a)(10) and subdivision (2) of this section. The consumers alleged: (1) that the manufacturer knew of defects in its refrigerators, which defects were a material fact; (2) the manufacturer

failed to disclose that material fact to the public, knowing that its failure to do so would tend to deceive the public and cause them to purchase its refrigerators; (3) the manufacturer failed to disclose the defects with the intent of having the public rely on its omission to purchase its refrigerators; and (4) the consumers suffered an injury because they relied on the manufacturer's omission and would not have purchased its refrigerators if the defects had been disclosed. *Rush v. Whirlpool Corp.*, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 17210 (W.D. Ark. Feb. 22, 2008).

**Scienter.**

Section 4-88-107(a)(10) and subdivision (2) of this section did not require knowing or intentional deception, and § 4-88-107(a)(10) listed deception as unlawful, and since omitting an installation requirement from defendant supplier's rebate documents could be a deceptive trade practice, plaintiff retailer's claims under those sections, alleging the retailer lost profits and was forced to issue its own rebates to customers due to the supplier's refusal to honor its rebate program for the retailer's customers, should have survived summary judgment; subdivision (1) of this section listed both fraud and deception as unlawful acts, and those terms could not be coterminous, as that result would violate the basic principle that a statute had to be construed so that every word was given meaning and effect, if possible, so that no word was left void, superfluous, or insignificant. *Curtis Lumber Co. v. La. Pac. Corp.*, 618 F.3d 762 (8th Cir. 2010).

**Cited:** *Arkansas Nursing Home, Inc. v. Rogers*, 279 Ark. 433, 652 S.W.2d 15 (1983); *New Equity Sec. Holders Comm. ex rel. Golden Gulf, Ltd. v. Phillips*, 97 B.R. 492 (E.D. Ark. 1989); *Stein v. Lukas*, 308 Ark. 74, 823 S.W.2d 832 (1992).

**4-88-109. Pyramiding devices.**

(a) Every person who contrives, prepares, sets up, proposes, or operates any pyramiding device shall be guilty of an unlawful practice.

(b)(1) As used in this section, a pyramiding device shall mean any scheme whereby a participant pays valuable consideration for the chance to receive compensation primarily from introducing one (1) or more additional persons into participation in the scheme or for the

chance to receive compensation when a person introduced by the participant introduces a new participant.

(2) "Compensation", as used in this section, does not mean or include payment based upon sales made to persons who are not participants in the scheme and who are not purchasing in order to participate in the scheme.

**History.** Acts 1971, No. 92, § 5; A.S.A. 1947, § 70-905; Acts 1991, No. 1177, § 3. merly codified as § 4-88-108. Former § 4-88-109 was renumbered as § 4-88-110 [repealed].

**A.C.R.C. Notes.** This section was for-

## RESEARCH REFERENCES

**ALR.** Practices Forbidden by State Deceptive Trade Practice and Consumer Protection Acts — Pyramid or Ponzi or Referral Sales Schemes. 48 A.L.R.6th 511.

### 4-88-110. [Repealed.]

**A.C.R.C. Notes.** This section was formerly codified as § 4-88-109. Former § 4-88-110 has been renumbered as § 4-88-111. zations, was repealed by Acts 1999, No. 1198, § 19. The section was derived from Acts 1983, No. 363, § 2; A.S.A. 1947, § 70-906.1; Acts 1991, No. 1177, § 3; 1993, No. 910, § 1.

**Publisher's Notes.** This section, concerning solicitations for charitable organi-

### 4-88-111. Investigations — Procedure — Confidential information.

(a) When the Attorney General determines that an investigation should be made as to whether a person has engaged in, is engaging in, or shows evidence of intent to engage in any practice declared to be unlawful by this chapter, when he or she receives a request for enforcement proceedings from a consumer or labor organization, better business bureau, chamber of commerce, or any state agency, or when he or she receives a written complaint from a consumer of a practice declared to be unlawful under this chapter, he or she may:

(1) Require that person to file a statement or report in writing as to the facts and circumstances concerning the matter, together with such other data as may be reasonably related thereto;

(2) Examine under oath or take the deposition of any person in connection with the matter; and

(3) Examine any merchandise, or sample thereof, sales tickets, or other records relating thereto.

(b) Unless otherwise ordered by a court for good cause shown, no statement or documentary material produced pursuant to a demand under this section shall be produced for inspection or copying by, nor shall the contents thereof be disclosed to, any person other than the authorized employee of the Attorney General without the consent of the person who produced the material.

(c) The Attorney General or any attorney designated by him or her may use the documentary material or copies thereof in the enforcement

of this chapter by presentation before any court, provided that any such material which contains trade secrets shall not be presented except with the approval of the court in which the action is pending after adequate notice to the person furnishing such material. However, when material containing trade secrets is presented with court approval, the material and the evidence pertaining thereto shall be held in camera and shall not be part of the court record or trial transcript.

(d) No statements, documents, or other information maintained or produced as a result of an ongoing investigation of possible violations of this chapter shall be disclosed to any person other than those persons specifically authorized by the Attorney General to receive such information.

**History.** Acts 1971, No. 92, § 9; A.S.A. 1947, § 70-909; Acts 1991, No. 1177, § 3; 1993, No. 587, § 3.

**A.C.R.C. Notes.** This section was for-

merly codified as § 4-88-110. Former § 4-88-111 has been renumbered as § 4-88-112.

### CASE NOTES

#### Testimony.

Assistant Attorney General allowed to testify against defendant where the information came to the Attorney General's office as a result of a civil investigation

demand, and where the testimony came in without objection or a motion to strike. *Cheqnet Sys. v. Montgomery*, 322 Ark. 742, 911 S.W.2d 956 (1995).

### 4-88-112. Failure to cooperate in investigations — Proceedings.

(a) In the event any person fails or refuses to file a statement, appear, or produce records as required by § 4-88-111, the Attorney General, acting through the Consumer Counsel, may file, in the circuit court of the county in which the person resides or transacts business or of the judicial district in which the State Capitol is located, a petition for an order of such court for the civil enforcement of such section.

(b) Upon the filing of the petition and service upon the person, the court shall have jurisdiction to hear and determine the matter so presented and to enter such order, including temporary injunctions, as may be required to effectuate this chapter.

(c) Willful concealment, destruction, alteration, or falsification of any documentary material which would be subject to subpoena by the court or the disobedience of any order of the court is declared to be unlawful and shall be punished as contempt of court.

(d) Any final order shall be subject to appeal to the Supreme Court of Arkansas.

**History.** Acts 1971, No. 92, § 10; A.S.A. 1947, § 70-910; Acts 1991, No. 1177, § 3; 1995, No. 836, § 3.

**A.C.R.C. Notes.** This section was formerly codified as § 4-88-111. Former § 4-

88-112 has been renumbered as § 4-88-113.

**Cross References.** Jurisdiction of circuit courts, Ark. Const. Amend. 80, §§ 6, 19.

**4-88-113. Civil enforcement and remedies — Suspension or forfeiture of charter, franchise, etc.**

(a) In any proceeding brought by the Attorney General for civil enforcement of the provisions of this chapter, prohibiting unlawful practices as defined in this chapter, the circuit court may make such orders or judgments as may be necessary to:

(1) Prevent the use or employment by such person of any prohibited practices;

(2)(A) Restore to any purchaser who has suffered any ascertainable loss by reason of the use or employment of the prohibited practices any moneys or real or personal property which may have been acquired by means of any practice declared to be unlawful by this chapter, together with other damages sustained.

(B) In determining the amount of restitution to be awarded under this section, the court shall consider affidavits from nontestifying purchasers, provided that:

(i) The affidavits are offered as evidence of a material fact;

(ii) The affidavits are more probative on the point for which they are offered than any other evidence which the Attorney General can procure through reasonable efforts;

(iii) The interests of justice will be best served by admission of the affidavits; and

(iv) The Attorney General makes the names and addresses of the affiants available to the adverse party sufficiently in advance to provide the adverse party with a fair opportunity to communicate with them; and

(3) Assess penalties to be paid to the state, not to exceed ten thousand dollars (\$10,000) per violation, against persons found to have violated this chapter.

(b) Upon petition of the Attorney General, the court may order the suspension or forfeiture of franchises, corporate charters, or other licenses or permits or authorization to do business in this state.

(c) Any person who violates the terms of an injunction issued under this chapter shall forfeit and pay to the state a civil penalty of not more than ten thousand dollars (\$10,000) for any single action brought by the Attorney General.

(d)(1) Every person who directly or indirectly controls another person who is in violation of or liable under this chapter and every partner, officer, or director of another person who is in violation of or liable under this chapter shall be jointly and severally liable for any penalties assessed and any monetary judgments awarded in any proceeding for civil enforcement of the provisions of this chapter, provided that the persons to be held jointly and severally liable knew or reasonably should have known of the existence of the facts by reason of which the violation or liability exists.

(2) There is contribution as in cases of contract among the several persons so liable.

(3) Every person subject to liability under subdivision (d)(1) of this section shall be deemed, as a matter of law, to have purposefully availed himself or herself of the privileges of conducting activities within Arkansas sufficient to subject the person to the personal jurisdiction of the circuit court hearing an action brought pursuant to this chapter.

(e) As compensation for his services under this chapter, the Attorney General shall be entitled to all expenses reasonably incurred in the investigation and prosecution of suits, including, but not limited to, expenses for expert witnesses, to be paid by the defendant when judgment is rendered for the state, and, in addition, shall recover attorney's fees and costs.

(f) Any person who suffers actual damage or injury as a result of an offense or violation as defined in this chapter has a cause of action to recover actual damages, if appropriate, and reasonable attorney's fees.

**History.** Acts 1971, No. 92, § 11; 1977, No. 835, § 1; A.S.A. 1947, § 70-911; Acts 1991, No. 1177, § 3; 1993, No. 587, § 4; 1995, No. 836, § 4; 1999, No. 990, § 1.

**A.C.R.C. Notes.** This section was for-

merly codified as § 4-88-112.

**Cross References.** Jurisdiction of circuit courts, Ark. Const. Amend. 80, §§ 6, 19.

## RESEARCH REFERENCES

**ALR.** Right to private action under state consumer protection act — Equitable relief available. 115 A.L.R.5th 709.

Right to private action under state consumer protection act — Preconditions to action. 117 A.L.R.5th 155.

**U. Ark. Little Rock. L. Rev.** Annual Survey of Case Law, Civil Procedure, 28 U. Ark. Little Rock L. Rev. 631.

Annual Survey of Case Law: Practice, Procedure, and Courts, 29 U. Ark. Little Rock L. Rev. 905.

## CASE NOTES

### ANALYSIS

In General.

Actual Damages.

Class Action.

Costs and Fees.

Elements of Claim.

Judgment on Pleadings.

Lost Profits.

Standing.

### In General.

This section limits a private cause of action for deceptive trade practices under § 4-88-107 to instances where actual damage or injury has occurred; hence, where the only alleged injury is the diminution in value of a product, a private cause of action is not cognizable. *Wallis v. Ford Motor Co.*, 362 Ark. 317, 208 S.W.3d 153 (2005).

Plaintiff's motion to dismiss defendant's

Arkansas Deceptive Trade Practices Act (ADTPA) claim on the ground that the ADTPA was not cognizable because defendant was not a consumer was denied because one did not have to be a consumer to recover under the ADTPA pursuant to subsection (f) of this section and §§ 4-88-101 and 4-88-102(5). *Valor Healthcare, Inc. v. Pinkerton*, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 105988 (W.D. Ark. Dec. 23, 2008).

Claims stated by the contractor in Count I constituted ordinary breach-of-contract claims that did not rise to the level of violating the Arkansas Deceptive Trade Practices Act, §§ 4-88-101 to 4-88-503, as they were devoid of any factual bases on which the appellate court could conclude that the subcontractor engaged in deceptive business practices. *CEI Eng'g Assocs. v. Elder Constr. Co.*, 2009 Ark. App. 259, 306 S.W.3d 447 (2009).

**Actual Damages.**

Appellees could not recover damages for mental anguish as an element of actual damages under this section because appellees had no physical injury; Arkansas does not recognize negligent infliction of emotional distress. *FMC Corp. v. Helton*, 360 Ark. 465, 202 S.W.3d 490 (2005).

Trial court properly dismissed, for failure to state a claim, a class-action fraud and statutory deceptive trade practices lawsuit alleging that a concealed design defect caused a diminution in value of a vehicle; a private cause of action could not be maintained under § 4-88-107 because no actual damage or injury occurred within the meaning of this section. *Wallis v. Ford Motor Co.*, 362 Ark. 317, 208 S.W.3d 153 (2005).

Plaintiffs' § 4-88-107(a)(1) false representation/unfair competition claim, arising from the fact that defendant had begun using the same name that it used for its informal hunting club, failed as a matter of law because plaintiff did not offer any evidence showing that it suffered any actual damage or injury as a result of defendant's actions. Subsection (f) of this section required that plaintiff show such injury or damage, in order to pursue a claim under the Arkansas Deceptive Trade Practices Act. *Ark. Trophy Hunters Ass'n v. Tex. Trophy Hunters Ass'n*, 506 F. Supp. 2d 277 (W.D. Ark. 2007).

Plaintiffs' claims regarding violations of Telephonic Sellers Act and School Calendar Act were actionable under the Arkansas Deceptive Trade Practices Act, § 4-88-107, even though neither Act provided a private cause of action for consumers because a violation of either statute constituted a deceptive trade practice under the ADTPA pursuant to §§ 4-88-503(a), 4-99-111(b), and any person who suffered actual damage as a result of such a practice had a cause of action under the ADTPA, subsection (f) of this section. *M.S. Wholesale Plumbing, Inc. v. Univ. Sports Pubs. Co., Inc.*, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 4159 (E.D. Ark. Jan. 7, 2008).

Plaintiffs' claim alleging a violation of the Arkansas Deceptive Trade Practices Act (ADTPA), § 4-88-107(a)(1), (a)(10), was actionable because plaintiff had alleged sufficient facts to satisfy the ADTPA's actual damage requirement under subsection (f) of this section; plaintiff was not alleging that it purchased a product

with less economic value than represented by defendant, but instead, plaintiff claimed that it paid for a product that was not at all what defendant represented, that is, an advertisement sold on behalf of a university. *M.S. Wholesale Plumbing, Inc. v. Univ. Sports Pubs. Co., Inc.*, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 4159 (E.D. Ark. Jan. 7, 2008).

**Class Action.**

Superiority requirement was established in a class action suit against a title company under the Arkansas Deceptive Trade Practices Act, § 4-88-101 et seq., because it was not feasible to recover the small document fee charged to parties in real estate transactions in individual litigation and an examination of individual cases were not required; the title company's argument that this section showed the economic feasibility of individual claims was rejected. *Lenders Title Co. v. Chandler*, 358 Ark. 66, 186 S.W.3d 695 (2004).

**Costs and Fees.**

Subdivision (b)(2) of this section only provides for the award of attorneys' fees in those cases where the attorney general seeks the "suspension or forfeiture of franchises, corporate charters, or other licenses or permits, or authorizations to do business in the state"; where the attorney general does not seek such remedies, a request for attorney's fees will be denied. *State ex rel. Bryant v. McLeod*, 318 Ark. 781, 888 S.W.2d 639 (1994).

Subsection (b) of this section does not provide that expert-witness fees can be charged against the losing party. *State ex rel. Bryant v. McLeod*, 318 Ark. 781, 888 S.W.2d 639 (1994).

Trial court abused its discretion in awarding all of appellees' requested attorneys' fees where only one of their causes of action provided for fees; nothing in § 16-22-308 or this section provides that a party is entitled to an award of all fees in cases where multiple claims have been pursued. *FMC Corp. v. Helton*, 360 Ark. 465, 202 S.W.3d 490 (2005).

Plain reading of subsection (f) of this section requires that an award for actual damages or attorney's fees is predicated on prevailing on the claim or claims asserted; thus, where the jury rejected the buyer's claims pursuant to §§ 4-88-107

and 4-88-108, thereby denying her recovery of actual damages or attorney's fees, it was not necessary for the appellate court to consider whether attorney's fees were a part of an element of damages under subsection (f). *Thomas v. Olson*, 364 Ark. 444, 220 S.W.3d 627 (2005).

### **Elements of Claim.**

Appellee alleged that appellant made false representations and that its actions were deceptive and unconscionable under the Arkansas Deceptive Trade Practices Act. As appellee never explained what the false representations were or what acts appellant engaged in that violated the Act, and did not explain how it was damaged by appellant's actions, it failed to allege facts setting forth a cause of action under the Act. *Forever Green Ath. Fields, Inc. v. Lasiter Constr., Inc.*, 2011 Ark. App. 347, — S.W.3d — (2011).

### **Judgment on Pleadings.**

Judgment on the pleadings was entered because Arkansas counties could not pursue a private action under subsection (f) of this section against companies that produced and marketed cold remedies containing ephedrine and pseudoephedrine, which were ingredients used in manufacturing methamphetamine (meth), because the counties failed to assert actionable claims under the Arkansas Deceptive Trade Practices Act (ADTPA), §§ 4-88-101 to 4-88-503: (1) the counties alleged that the companies engaged in unconscionable behavior under § 4-88-107(a)(10), by failing to take action to prevent their remedies from being used to manufacture meth, by benefitting from that illegal use of their remedies, and by actively impeding measures to prevent the remedies from being used to manufacture meth; (2) the ADTPA was limited to trade practices and did not protect consumers or the counties against third party criminal conduct involving the use of the companies' remedies; (3) the counties could not show that the companies caused their financial injury because the companies did not have any special relationship with the counties that rendered them liable for the criminal acts of the meth manufactures; and (4) the

counties could not seek relief under the ADTPA because there injury was too remote, as there was no direct link between the companies' remedies and their alleged financial injuries. *Independence County v. Pfizer, Inc.*, 534 F. Supp. 2d 882 (E.D. Ark. 2008), *aff'd*, *Ashley County v. Pfizer*, 552 F.3d 659 (8th Cir. 2009).

### **Lost Profits.**

Where plaintiff retailer sued defendant supplier on claims of deceptive trade practices in connection with the supplier's refusal to honor its rebate program for the retailer's customers, if successful, the retailer's lost profits were recoverable under the Arkansas Deceptive Trade Practices Act, subsection (f) of this section, and the voluntary payment rule would not preclude a recovery of lost profits since, while the retailer's decision to issue its own rebates to customers could arguably be considered "voluntary," the retailer's alleged lost profits were not. *Curtis Lumber Co. v. La. Pac. Corp.*, 618 F.3d 762 (8th Cir. 2010).

### **Standing.**

It did not appear that Arkansas counties had standing to bring a suit under subsection (f) of this section of the Arkansas Deceptive Trade Practices Act (ADTPA), §§ 4-88-101 to 4-88-503, against companies that produced and marketed cold remedies containing ephedrine and pseudoephedrine, which were ingredients used in manufacturing methamphetamine (meth), because the counties could not show that they suffered actual damage or injury as a result of an offense or violation of the ADTPA. The counties had merely alleged that they expended significant sums in dealing with issues relating to the use and manufacture of meth and that the companies could and should have taken action to impede or eliminate the use of their remedies in meth manufacturing. *Independence County v. Pfizer, Inc.*, 534 F. Supp. 2d 882 (E.D. Ark. 2008), *aff'd*, *Ashley County v. Pfizer*, 552 F.3d 659 (8th Cir. 2009).

**Cited:** *Anderson v. Stewart*, 366 Ark. 203, 234 S.W.3d 295 (2006); *Holiday Inn Franchising v. Hotel Assocs.*, 2011 Ark. App. 147, — S.W.3d — (2011).

**4-88-114. Voluntary compliance.**

(a)(1) In the administration of this chapter, the Attorney General may accept an assurance of voluntary compliance with respect to any method, act, or practice deemed to be violative of the provisions of this chapter from any person who has engaged in or was about to engage in the method, act, or practice.

(2) Any such assurance shall be in writing and may be enforced by petitioning the circuit court of the county in which the alleged violator resides or has his principal place of business, or the Pulaski County Circuit Court.

(3) Such assurance of voluntary compliance shall not be considered an admission of violation for any purpose.

(b)(1) The assurance of voluntary compliance shall provide for the discontinuance by the person entering into the same of any method, act, or practice alleged to be a violation of this chapter, and it may include a stipulation for the payment by such person of reasonable expenses, investigative costs, and attorney's fees incurred by the Attorney General.

(2) The assurance may also include a stipulation for payment to consumers of actual damages or for restitution of money, property, or other things received from consumers in connection with a violation of the provisions of this chapter, and a stipulation for specific performance.

(c) A finding by a circuit court that a violation of such assurance of voluntary compliance has occurred shall prima facie establish that the person subject thereto knows, or in the exercise of due care should know, that he or she has in the past violated or is violating the provisions of this chapter.

(d) The assurance of voluntary compliance shall not be admissible into evidence in any separate criminal proceeding within the meaning of this chapter.

**History.** Acts 1993, No. 587, § 5; 1995, No. 836, § 5.      cuit courts, Ark. Const. Amend. 80, §§ 6, 19.

**Cross References.** Jurisdiction of cir-

**4-88-115. Statute of limitations.**

Any civil action brought to enforce the provisions of this chapter may be brought in any court of competent jurisdiction in this state during a period of five (5) years commencing on the date of the occurrence of the violation or the date upon which the cause of action arises.

**History.** Acts 1993, No. 910, § 2.

## CASE NOTES

## ANALYSIS

Doctrine of Fraudulent Concealment.  
Statute of Limitations.

**Doctrine of Fraudulent Concealment.**

Plaintiff's action was properly dismissed because his claims were clearly time-barred under §§ 16-56-111, 16-56-105, and this section, and by failing to allege when and how he discovered defendant's alleged fraud, plaintiff failed to meet his burden under Fed. R. Civ. P. 9(b), (f) of sufficiently pleading that the doctrine of fraudulent concealment saved his

otherwise time-barred claims. *Summerhill v. Terminix, Inc.*, 637 F.3d 877 (8th Cir. 2011).

**Statute of Limitations.**

Claims by mineral lessors, including under the Arkansas Deceptive Trade Practices Act, § 4-88-101 et seq., were properly dismissed as time-barred under § 16-56-105 and this section where they were brought more than five years after the leases were executed; fraud was not sufficiently shown for purposes of tolling. *Hipp v. Vernon L. Smith & Assocs.*, 2011 Ark. App. 611, — S.W.3d — (2011).

## SUBCHAPTER 2 — ENHANCED PENALTIES WHEN ELDER OR DISABLED PERSONS ARE TARGETED

## SECTION.

4-88-201. Definitions.

4-88-202. Civil penalty — Disposition of funds.

4-88-203. Determination of civil penalty.

4-88-204. Cause of action.

## SECTION.

4-88-205. Education initiatives.

4-88-206. Referrals for abuse, neglect, and exploitation.

4-88-207. Elder and Disabled Victims Fund created.

**4-88-201. Definitions.**

(a) "Elder person" means a person who is sixty (60) years of age or older.

(b) "Disabled person" means a person who has a physical or mental impairment which substantially limits one (1) or more of such person's major life activities.

(1) As used in this subsection, "physical or mental impairment" means any of the following:

(A) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss substantially affecting one (1) or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; or endocrine.

(B) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(2) The term "physical or mental impairment" includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech and hearing impairment, cerebral palsy, spina bifida, Down syndrome, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, and emotional illness.

(c) "Substantially limits" means substantially interferes with or affects over an extended period of time. Minor temporary ailments or

injuries shall not be considered physical or mental impairments that substantially limit a person's major life activities. Examples of minor temporary ailments are colds, influenza, sprains, or minor injuries.

(d) "Major life activities" include functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

**History.** Acts 1993, No. 138, § 1; 2011, inserted "spina bifida, Down syndrome" in No. 68, § 1. (b)(2).

**Amendments.** The 2011 amendment

### CASE NOTES

**Cited:** *Tay-Tay, Inc. v. Young*, 349 Ark. 675, 80 S.W.3d 365 (2002).

#### 4-88-202. Civil penalty — Disposition of funds.

(a) If any person is found to have violated any provision of this chapter, including unlawful practices related to charitable solicitations, and the violation is committed against elder or disabled persons, in addition to any civil penalty otherwise set forth or imposed, the court may impose an additional civil penalty not to exceed ten thousand dollars (\$10,000) for each violation.

(b) The civil penalties imposed pursuant to subsection (a) of this section shall be deposited with the Treasurer of State and placed into the Elder and Disabled Victims Fund, a special fund created in the State Treasury and administered by the Attorney General for the investigation and prosecution of deceptive acts against elder and disabled persons and for consumer education initiatives.

**History.** Acts 1993, No. 138, § 1.

#### 4-88-203. Determination of civil penalty.

In determining whether to impose an enhanced civil penalty under this subchapter and the amount thereof, the court shall consider the extent to which one (1) or more of the following factors are present:

(1) Whether the defendant's conduct was in disregard of the rights of the elder or disabled person;

(2) Whether the defendant knew or should have known that the defendant's conduct was directed to an elder person or disabled person;

(3) Whether the elder or disabled person was more vulnerable to the defendant's conduct because of age, poor health, infirmity, impaired understanding, restricted mobility, or disability than other persons and whether the elder or disabled person actually suffered substantial physical, emotional, or economic damage resulting from the defendant's conduct;

(4) Whether the defendant's conduct caused an elder or disabled person to suffer any of the following:

(A) Mental or emotional anguish;

(B) Loss of or encumbrance upon a primary residence of the elder or disabled person;

(C) Loss of or encumbrance upon the elder or disabled person's principal employment or principal source of income;

(D) Loss of funds received under a pension or retirement plan or a government benefits program;

(E) Loss of property set aside for retirement or for personal or family care and maintenance; or

(F) Loss of assets essential to the health and welfare of the elder or disabled person; or

(5) Any other factors the court deems appropriate.

**History.** Acts 1993, No. 138, § 1.

#### **4-88-204. Cause of action.**

An elder or disabled person who suffers damage or injury as a result of an offense or violation described in this chapter has a cause of action to recover actual damages, punitive damages, if appropriate, and reasonable attorney's fees. Restitution ordered pursuant to this section has priority over a civil penalty imposed pursuant to this subchapter.

**History.** Acts 1993, No. 138, § 1.

#### **4-88-205. Education initiatives.**

The Attorney General shall, pursuant to the funds allocated in this subchapter, develop and implement statewide educational initiatives to inform elder persons and disabled persons, law enforcement agencies, the judicial system, social services professionals, and the general public as to the prevalence and prevention of consumer crimes against elder and disabled persons, the provisions of this chapter, the penalties for violations of this chapter, and the remedies available for victims of violations.

**History.** Acts 1993, No. 138, § 1.

#### **4-88-206. Referrals for abuse, neglect, and exploitation.**

The Attorney General shall establish and maintain referral procedures with the Division of Aging and Adult Services within the Department of Human Services in order to provide any necessary intervention and assistance to elder or disabled persons who may have been victimized by violations of this chapter.

**History.** Acts 1993, No. 138, § 1.

**4-88-207. Elder and Disabled Victims Fund created.**

The “Elder and Disabled Victims Fund” is hereby created and established on the books of the Treasurer of State, Auditor of State, and Chief Fiscal Officer of the State and shall consist of those special funds as may be provided by law. This fund shall be used for the investigation and prosecution of deceptive acts against elder and disabled persons and for consumer education initiatives directed toward elder and disabled persons, law enforcement officers, the judicial system, social services professionals, and the general public on the provisions of this chapter and related statutes.

**History.** Acts 1993, No. 138, § 2.

**Publisher’s Notes.** Acts 1993, No. 138, § 2 is also codified as § 19-6-473.

**SUBCHAPTER 3 — PROTECTION OF CONSUMERS FROM PRICE GOUGING AND UNFAIR PRICING PRACTICES DURING AND SHORTLY AFTER A STATE OF EMERGENCY**

SECTION.

- 4-88-301. Emergencies and natural disasters — Taking unfair advantage of consumers.
- 4-88-302. Definitions.
- 4-88-303. Prohibited unfair pricing practices.

SECTION.

- 4-88-304. Penalties, remedies, and enforcement.
- 4-88-305. Preemption.

**Effective Dates.** Acts 1997, No. 376, § 6: March 6, 1997. Emergency clause provided: “It is found and determined by the General Assembly of the State of Arkansas that the widespread practice of price gouging and unfair pricing during and shortly after an emergency has created numerous problems for consumers; that such price gouging is particularly egregious due to the very nature of such an emergency; that such price gouging has a significant negative impact upon the economy and well-being of this state and its local communities; and that this act is necessary for the protection of the people of Arkansas. Therefore an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is

vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto.”  
Acts 2003, No. 1448, § 4: Apr. 16, 2003. Emergency clause provided: “It is found and determined by the General Assembly of the State of Arkansas that present law pertaining to price gouging does not adequately address the circumstances of terrorists attacks and war; that this act enhances the price gouging laws of this state to cover those situations; and that the imminent prospect of war and further terrorists attacks dictate that this act should go into effect as soon as possible. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor

and the veto is overridden, the date the last house overrides the veto.”

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#### **4-88-301. Emergencies and natural disasters — Taking unfair advantage of consumers.**

The General Assembly hereby finds that during emergencies and major disasters, including, but not limited to, tornadoes, earthquakes, fires, floods, or civil disturbances, some merchants have taken unfair advantage of consumers by greatly increasing prices for essential consumer goods or services. While the pricing of consumer goods and services is generally best left to the marketplace under ordinary conditions, when a declared state of emergency results in abnormal disruptions of the market, the public interest requires that excessive and unjustified increases in the prices of essential consumer goods and services be prohibited. It is the intent of the General Assembly in enacting this subchapter to protect citizens from excessive and unjustified increases in the prices charged during or shortly after a declared state of emergency for goods and services that are vital and necessary for the health, safety, and welfare of consumers. Further, it is the intent of the General Assembly that this section be liberally construed so that its beneficial purposes may be served.

**History.** Acts 1997, No. 376, § 1.

#### **4-88-302. Definitions.**

(a) “Building materials” means lumber, construction tools, windows, and anything else used in the building or rebuilding of property.

(b) “Consumer food item” means any article that is used or intended for use for food, drink, confection, or condiment by a person or animal.

(c) “Emergency supplies” includes, but is not limited to, water, flashlights, radios, batteries, candles, blankets, soap, diapers, temporary shelters, tape, toiletries, plywood, nails, and hammers.

(d) “Gasoline” means any fuel used to power any motor vehicle or power tool.

(e) “Goods” has the same meaning as defined in § 4-88-102(4).

(f) “Housing” means any rental housing and includes any housing provided by a hotel or motel.

(g) “Local emergency” means a natural or man-made disaster or emergency resulting from a tornado, earthquake, flood, fire, riot, or storm for which a local emergency has been declared by the executive officer or governing body of any city or county in Arkansas.

(h) “Medical supplies” includes, but is not limited to, prescription and nonprescription medications, bandages, gauze, isopropyl alcohol, and antibacterial products.

(i) "Person" means a natural person, individual, partnership, corporation, trust, estate, incorporated or unincorporated association, and any other legal or commercial entity however organized.

(j) "Repair or reconstruction services" means services performed by any person for repairs to residential or commercial property of any type that is damaged as a result of a disaster or terrorist attack.

(k) "Services" means any work, labor, or services including services furnished in connection with the sale or repair of goods or real property or improvements thereto.

(l)(1) "State of emergency" means a natural or man-made disaster or emergency resulting from a tornado, earthquake, flood, fire, riot, storm, act of war, threat of war, military action, or the time of instability following a terrorist attack for which a state of emergency has been declared by the President of the United States or the Governor.

(2) "State of emergency" also includes the declaration of a red condition in the Homeland Security Advisory System by either the United States Department of Homeland Security or the Arkansas Department of Emergency Management.

(m) "Transportation, freight, and storage services" means any service that is performed by any person or company that contracts to move, store, or transport personal or business property or rents equipment for those purposes.

**History.** Acts 1997, No. 376, § 1; 2003, No. 1082, § 1; 2003, No. 1448, § 2.

**A.C.R.C. Notes.** Acts 2003, No. 1448, § 1 provided: "Legislative intent. The General Assembly finds and declares that:

"(1) The threats of terrorist attacks and war are real and could impose horrific social and economic damage on Arkansas;

"(2) The threat of terrorist attacks and war can dismantle the stability of markets and free trade;

"(3) Pricing of consumer goods and services is generally best left to the marketplace under ordinary conditions, but when a terrorist attack, a threat of war, or an act of war results in abnormal disruptions of the market, the public interest requires that excessive and unjustified increases in

the prices of consumer goods and services should be discouraged;

"(4) Protecting the public from price gouging is a vital function of state government in providing for the health, safety, and welfare of consumers; and

"(5)(A) The intent of the General Assembly is to protect citizens, during the time of instability and uncertainty that follows a terrorist attack, a threat of war, or during a time of war, from excessive and unjustified increases in the prices charged for goods and services that are vital or necessary for the consumer.

"(B) Further, it is the intent of the General Assembly that this act be liberally construed so that its beneficial purposes may be served."

## RESEARCH REFERENCES

**U. Ark. Little Rock L. Rev.** Survey of Legislation, 2003 Arkansas General As-

sembly, Business Law, 26 U. Ark. Little Rock L. Rev. 351.

### 4-88-303. Prohibited unfair pricing practices.

(a)(1) Upon the proclamation of a state of emergency resulting from a tornado, earthquake, flood, fire, riot, storm, or natural or man-made disaster declared by the President of the United States or the Governor

and upon the declaration of a local emergency resulting from a tornado, earthquake, flood, fire, riot, storm, or natural or man-made disaster by the executive officer of any city or county and for a period of thirty (30) days following that declaration or during any period of time during which a red condition under the Homeland Security Advisory System has been declared by either the United States Department of Homeland Security or the Arkansas Department of Emergency Management, it is unlawful for any person, contractor, business, or other entity to sell or offer to sell any consumer food items or goods, goods or services used for emergency cleanup, emergency supplies, medical supplies, home heating oil, building materials, housing, transportation, freight, and storage services, or gasoline or other motor fuels for a price of more than ten percent (10%) above the price charged by that person for those goods or services immediately prior to the proclamation of emergency.

(2) However, a greater price increase shall not be unlawful if that person can prove that the increase in price was directly attributable to additional costs imposed on it by the supplier of the goods or directly attributable to additional costs for labor or materials used to provide the services, provided that in those situations where the increase in price is attributable to additional costs imposed by the seller's supplier or additional costs of providing the good or service during the state of emergency, the price represents no more than ten percent (10%) above the total of the cost to the seller plus the markup customarily applied by the seller for that good or service in the usual course of business immediately prior to the onset of the state of emergency.

(b)(1) Upon the proclamation of a state of emergency resulting from a tornado, earthquake, flood, fire, riot, or storm declared by the President of the United States or the Governor, or upon the declaration of a local emergency resulting from a tornado, earthquake, flood, fire, riot, or storm by the executive officer of any city or county, and for a period of one hundred eighty (180) days following that declaration, it is unlawful for any contractor to sell or offer to sell any repair or reconstruction services or any services used in emergency cleanup for a price of more than ten percent (10%) above the price charged by that person for those services immediately prior to the proclamation of emergency.

(2) However, a greater price increase shall not be unlawful if that person can prove that the increase in price was directly attributable to additional costs imposed on it by the supplier of the goods or directly attributable to additional costs for labor or materials used to provide the services, provided that in those situations where the increase in price is attributable to the additional costs imposed by the contractor's supplier or additional costs of providing the service during the state of emergency, the price represents no more than ten percent (10%) above the total of the cost to the contractor plus the markup customarily applied by the contractor for that good or service in the usual course of business immediately prior to the onset of the state of emergency.

(c) The provisions of this section may be extended for additional thirty-day periods by a local governing body or the General Assembly if

deemed necessary to protect the lives, property, or welfare of the citizens.

(d) Any business offering an item for sale at a reduced price immediately prior to the proclamation of the emergency may use the price at which it usually sells the item to calculate the price pursuant to subsection (a) or (b) of this section.

**History.** Acts 1997, No. 376, § 1; 2003, No. 1448, § 3.

**A.C.R.C. Notes.** Acts 2003, No. 1448, § 1 provided: "Legislative intent. The General Assembly finds and declares that:

"(1) The threats of terrorist attacks and war are real and could impose horrific social and economic damage on Arkansas;

"(2) The threat of terrorist attacks and war can dismantle the stability of markets and free trade;

"(3) Pricing of consumer goods and services is generally best left to the marketplace under ordinary conditions, but when a terrorist attack, a threat of war, or an act of war results in abnormal disruptions of the market, the public interest requires that excessive and unjustified increases in

the prices of consumer goods and services should be discouraged;

"(4) Protecting the public from price gouging is a vital function of state government in providing for the health, safety, and welfare of consumers; and

"(5)(A) The intent of the General Assembly is to protect citizens, during the time of instability and uncertainty that follows a terrorist attack, a threat of war, or during a time of war, from excessive and unjustified increases in the prices charged for goods and services that are vital or necessary for the consumer.

"(B) Further, it is the intent of the General Assembly that this act be liberally construed so that its beneficial purposes may be served."

#### 4-88-304. Penalties, remedies, and enforcement.

(a)(1) When a person violates this subchapter or a regulation prescribed under this subchapter, the violation shall constitute an unfair or deceptive act or practice as defined by this chapter.

(2) All remedies, penalties, and authority granted to the Attorney General under this chapter shall be available to the Attorney General for the enforcement of this subchapter.

(b) Any person who is found to have violated this subchapter shall be guilty of a Class A misdemeanor.

(c) The remedies and penalties provided by this section are cumulative to each other, the remedies under § 17-25-301 et seq., and the remedies or penalties available under all other laws of this state.

**History.** Acts 1997, No. 376, § 1; 2005, No. 1994, § 218.

conscionable trade practices generally, § 4-88-107.

**Cross References.** Deceptive and un-

#### 4-88-305. Preemption.

Nothing in this section shall preempt any local ordinance prohibiting the same or similar conduct or imposing a more severe penalty for the same conduct prohibited in this section.

**History.** Acts 1997, No. 376, § 1.

**SUBCHAPTER 4 — “SLAMMING” IN THE TELECOMMUNICATIONS INDUSTRY**

## SECTION.

4-88-401. Definitions.

4-88-402. Slamming.

## SECTION.

4-88-403. Penalties, remedies, and enforcement.

**4-88-401. Definitions.**

As used in this subchapter:

(1) “Person” means any individual, group, unincorporated association, limited or general partnership, limited liability corporation, corporation, professional fund raiser, charitable organization, or other business entity;

(3) “Slamming” means submitting or executing a change in a subscriber’s selection of a provider of telephone exchange service or telephone toll service except in accordance with the verification procedures as the Federal Communications Commission shall prescribe; and

(3) “Subscriber” means a telecommunications service provider’s retail business customer or a retail residential customer.

**History.** Acts 1999, No. 1489, § 1.

**4-88-402. Slamming.**

No telecommunications service provider and no person acting on behalf of any telecommunications service provider shall engage in the practice of slamming as defined in § 4-88-401(2).

**History.** Acts 1999, No. 1489, § 1.

**4-88-403. Penalties, remedies, and enforcement.**

(a) When a person violates this subchapter or a regulation prescribed under this subchapter, the violation shall constitute an unfair or deceptive act or practice as defined by the Deceptive Trade Practices Act, § 4-88-101 et seq.

(b)(1) All remedies, penalties, and authority granted to the Attorney General under the Deceptive Trade Practices Act, § 4-88-101 et seq., shall be available to the Attorney General for the enforcement of this subchapter.

(2) The remedies and penalties provided by this section are cumulative to each other and the remedies or penalties available under all other laws of this state.

**History.** Acts 1999, No. 1489, § 1.

## SUBCHAPTER 5 — DISCLOSURES BY SOLICITORS FOR ADVERTISEMENTS ON SCHOOL CALENDARS

### SECTION.

4-88-501. Definitions.

4-88-502. Violations.

### SECTION.

4-88-503. Penalty.

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**Effective Dates.** Acts 1999, No. 1284, § 7: Apr. 9, 1999. Emergency clause provided: "It is hereby found and determined by the Eighty-second General Assembly that Arkansas consumers must be provided with all relevant information necessary to make an informed decision concerning school calendar solicitations due to the prevalence of misleading solicitations that ultimately harm legitimate school fund raising efforts. Therefore, an emergency is declared to exist and this act

being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

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### 4-88-501. Definitions.

As used in this subchapter:

(1) "Person" shall have the same meaning as provided in § 4-88-102(5); and

(2) "School calendar" means a poster or other printed material that depicts a school mascot, emblem, or name in conjunction with an athletic event or schedule.

**History.** Acts 1999, No. 1284, § 1.

### 4-88-502. Violations.

(a) This subchapter shall not be construed to permit an activity otherwise prohibited by law.

(b)(1) A person who solicits advertisements for school calendars shall disclose whether or not the school whose name, emblem, or mascot is used will receive any funds as a result of the solicitation and, if so, what percentage or amount of those funds the school will receive.

(2) If the school whose name, emblem, or mascot is used will not receive a percentage of any funds raised, the person making the solicitation must clearly and conspicuously disclose, both orally and in writing at the time the person makes the solicitation, that the school will not receive a percentage of any funds raised.

(c) Subsection (b) of this section shall not apply to a person who solicits advertisements for university calendars when the person has a written contract with the university.

**History.** Acts 1999, No. 1284, § 2; 2009, No. 645, § 1; 2011, No. 719, § 4.

**Amendments.** The 2009 amendment added (c).

The 2011 amendment substituted "This subchapter shall not" for "Nothing in this subchapter shall" in (a).

### 4-88-503. Penalty.

(a) A violation of this subchapter shall constitute a violation of § 4-88-101 et seq. pertaining to deceptive trade practices.

(b) All remedies, penalties, and authority granted to the Attorney General under § 4-88-101 et seq. shall be available to the Attorney General for the enforcement of this subchapter.

**History.** Acts 1999, No. 1284, § 3.

## CASE NOTES

### Deceptive Trade Practice.

Plaintiff's claims regarding violations of Telephonic Sellers Act and School Calendar Act were actionable under the Arkansas Deceptive Trade Practices Act, § 4-88-107, even though neither Act provided a private cause of action for consumers because a violation of either statute constituted a deceptive trade practice under the

ADTPA pursuant to subsection (a) of this section and § 4-99-111(b), and any person who suffered actual damage as a result of such a practice had a cause of action under the ADTPA, § 4-88-113(f). *M.S. Wholesale Plumbing, Inc. v. Univ. Sports Pubs. Co., Inc.*, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 4159 (E.D. Ark. Jan. 7, 2008).

## SUBCHAPTER 6 — UNSOLICITED COMMERCIAL AND SEXUALLY EXPLICIT ELECTRONIC MAIL PREVENTION ACT

### SECTION.

4-88-601. Title.

4-88-602. Definitions.

4-88-603. Unsolicited commercial or sexually explicit electronic mail — Requirements.

4-88-604. Interactive computer service and electronic mail service provider authority.

### SECTION.

4-88-605. Criminal penalty.

4-88-606. Civil action for violation —  
Election on damages —  
Costs and attorney's fees —  
Defense.

4-88-607. Enforcement of subchapter.

### 4-88-601. Title.

This subchapter may be referred to and cited as the "Unsolicited Commercial and Sexually Explicit Electronic Mail Prevention Act".

**History.** Acts 2003, No. 1019, § 1.

## RESEARCH REFERENCES

**U. Ark. Little Rock L. Rev.** Survey of Legislation, 2003 Arkansas General As-

sembly, Business Law, 26 U. Ark. Little Rock L. Rev. 351.

**4-88-602. Definitions.**

As used in this subchapter:

(1) "Commercial" means for the purpose of promoting the sale, lease, or exchange of goods, services, or real property;

(2) "Computer network" means a set of related remotely connected devices and communication facilities, including two (2) or more computers with the capability to transmit data through communication facilities;

(3) "Electronic mail" means an electronic message, a file, data, or other information that is transmitted:

(A) Between two (2) or more computers, computer networks, or electronic terminals; or

(B) Within or between computer networks;

(4) "Electronic mail address" means a destination commonly expressed as a string of characters to which electronic mail may be sent or delivered;

(5) "Electronic mail service provider" means a person who:

(A) Is an intermediary in the transmission of electronic mail from the sender to the recipient; or

(B) Provides to end users of electronic mail service the ability to send and receive electronic mail;

(6) "Harmful to minors" shall have the same meaning as set forth in § 5-68-501(2);

(7) "Interactive computer service" means an information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet, and also the systems operated or services offered by libraries or educational institutions;

(8) "Internet domain name" means a globally unique, hierarchical reference to an Internet host or service assigned through centralized Internet authorities and comprising a series of character strings separated by periods, with the right-most string specifying the top of the hierarchy;

(9) "Person" means any individual, corporation, partnership, association, limited liability company, any other form or business association, or any combination of them;

(10)(A)(i) "Preexisting business relationship" means that there was a business transaction or communication between the sender and the recipient of a commercial electronic mail message during the five-year period preceding the receipt of that message.

(ii) A preexisting business relationship does not exist after a recipient requests to be removed from the distribution list of a sender.

(B) If a sender operates through separate lines of business or divisions and holds itself out to the recipient as that particular line of business or division rather than as the entity of which the line of business or division is a part, then the line of business or the division shall be treated as the sender for purposes of this section;

(11) “Sexually explicit electronic mail” means a commercial electronic mail that contains material that is harmful to minors or promotes an electronic link to material that is harmful to minors; and

(12) “Unsolicited” means without the recipient’s express permission, except that commercial electronic mail is not unsolicited if the sender has a preexisting business or personal relationship with the recipient.

**History.** Acts 2003, No. 1019, § 1.

#### **4-88-603. Unsolicited commercial or sexually explicit electronic mail — Requirements.**

(a) Each person who sends or causes to be sent an unsolicited commercial electronic mail or an unsolicited sexually explicit electronic mail through the intermediary of an electronic mail service provider or to an electronic mail address held by a resident of the state shall:

(1) Conspicuously state in the electronic mail the sender’s:

(A) Legal name;

(B) Correct street address; and

(C) Valid Internet domain name;

(2) For a sexually explicit electronic mail, include in the electronic mail a subject line that contains “adv:adult” as the first nine (9) characters;

(3) Provide the recipient a convenient, no-cost mechanism to notify the sender not to send any future electronic mail to the recipient, including:

(A) Return electronic mail to a valid, functioning return electronic address; and

(B) For a sexually explicit electronic mail and if the sender has a toll-free telephone number, the sender’s toll-free telephone number; and

(4) Conspicuously provide in the text of the electronic mail a notice:

(A) That informs the recipient that the recipient may conveniently and at no cost be excluded from future commercial or sexually explicit electronic mail, as the case may be, from the sender; and

(B) For sexually explicit electronic mail, if the sender has a toll-free telephone number, that includes the sender’s valid, toll-free telephone number that the recipient may call to be excluded from future electronic mail from the sender.

(b)(1) A commercial electronic mail is not unsolicited if the sender has a preexisting business or personal relationship with the recipient.

(2) The sender of a commercial electronic mail of this nature must still include in the electronic mail message the required disclosures set forth in subdivisions (a)(3) and (4) of this section and shall remove the recipient from future mailings if requested.

(c) A person who sends or causes to be sent an unsolicited commercial electronic mail or an unsolicited sexually explicit electronic mail through the intermediary of an electronic mail service provider located in the state or to an electronic mail address held by a resident of the state may not:

(1) Use a third party's Internet domain name in identifying the point of origin or in stating the transmission path of the electronic mail without the third party's consent;

(2) Misrepresent any information in identifying the point of origin or the transmission path of the electronic mail; or

(3) Fail to include in the electronic mail the information necessary to identify the point of origin of the electronic mail.

(d)(1) If the recipient of an unsolicited commercial electronic mail or an unsolicited sexually explicit electronic mail notifies the sender that the recipient does not want to receive future commercial electronic mail or future sexually explicit electronic mail from the sender, the sender may not send that recipient a commercial electronic mail or a sexually explicit electronic mail either directly or through a subsidiary or affiliate.

(2) If a recipient has requested to be removed from future mailings, the sender may recontact the recipient if a preexisting business relationship has been reestablished or if the recipient has expressly requested to receive future mailings from the sender.

**History.** Acts 2003, No. 1019, § 1.

#### **4-88-604. Interactive computer service and electronic mail service provider authority.**

(a) An interactive computer service or electronic mail service provider may block the receipt or transmission through its service of any bulk electronic mail that it reasonably believes is or will be sent in violation of this subchapter.

(b) An interactive computer service or electronic mail service provider is not:

(1) In violation of this section and the injured party shall not have a cause of action against an interactive computer service or mail service provider due to the fact that the interactive computer service or electronic mail service provider:

(A) Is an intermediary between the sender and recipient in the transmission of an electronic mail that violates this section; or

(B) Provides transmission of unsolicited commercial electronic mail messages over the provider's computer network or facilities; or

(2) Liable for any action it voluntarily takes in good faith to block the receipt or transmission through its service of any electronic mail advertisements that it believes is or will be sent in violation of this subchapter.

(c) An interactive computer service may disconnect or terminate the service of any person who is in violation of this subchapter.

**History.** Acts 2003, No. 1019, § 1.

**4-88-605. Criminal penalty.**

(a) A person who violates any requirement of § 4-88-603 with respect to an unsolicited sexually explicit electronic mail is guilty of a Class B misdemeanor.

(b) A person who is found guilty of, or pleads guilty or nolo contendere to, violations of § 4-88-603 is not relieved from civil liability in an action under § 4-88-606.

**History.** Acts 2003, No. 1019, § 1.

**4-88-606. Civil action for violation — Election on damages — Costs and attorney's fees — Defense.**

(a) For any violation of a provision of this subchapter, an action may be brought by:

(1) A person who received the unsolicited commercial electronic mail or unsolicited sexually explicit electronic mail that violates this subchapter; or

(2) An electronic mail service provider through whose facilities the unsolicited commercial electronic mail or unsolicited sexually explicit electronic mail was transmitted.

(b)(1) In each action under subdivision (a)(1) of this section, a recipient or electronic mail service provider may elect, in lieu of actual damages, to recover the lesser of:

(A) Ten dollars (\$10.00) per unsolicited commercial electronic mail or unsolicited sexually explicit electronic mail sent to a previously opted-out electronic mail address or transmitted through the electronic mail service provider or otherwise sent in violation of this subchapter; or

(B) Twenty-five thousand dollars (\$25,000) per day the violation occurs.

(2) Each prevailing recipient or electronic mail service provider shall be awarded costs and reasonable attorney's fees.

(c) It is an affirmative defense to a violation of this subchapter if a person can demonstrate that the sender at the time of the alleged violation had:

(1) Maintained a list of consumers who have notified the person not to send any subsequent commercial electronic messages;

(2) Established and implemented with due care and reasonable practices and procedures to effectively prevent unsolicited commercial electronic mail messages in violation of this subchapter;

(3) Trained the sender's personnel in the requirements of this subchapter; and

(4) Maintained records demonstrating compliance with this subchapter.

**History.** Acts 2003, No. 1019, § 1.

## RESEARCH REFERENCES

**ALR.** Validity, construction, and application of federal and state statutes regulating unsolicited email or “spam”. 10 A.L.R.6th 1.

### 4-88-607. Enforcement of subchapter.

(a)(1) Any transmission of unsolicited commercial or sexually explicit electronic mail in violation of this subchapter shall constitute an unfair and deceptive act or practice under § 4-88-107.

(2) All remedies, penalties, and authority granted to the Attorney General under the Deceptive Trade Practices Act, § 4-88-101 et seq., or this subchapter shall be available to the Attorney General for the enforcement of this subchapter.

(b) The prosecuting attorneys of the various districts and counties of this state shall also have full authority to enforce the provisions of this subchapter.

(c) Nothing in the provisions of this subchapter shall prohibit the bringing of a civil action against a violator of this subchapter by an individual harmed by a deceptive trade practice.

**History.** Acts 2003, No. 1019, § 1.

## SUBCHAPTER 7 — FAIR GIFT CARD ACT

### SECTION.

4-88-701. Short title.

4-88-702. Definitions.

4-88-703. Regulation of unfair and deceptive acts and practices in connection with gift cards.

### SECTION.

4-88-704. Exclusions.

4-88-705. Enforcement.

4-88-706. Rules.

### 4-88-701. Short title.

This act shall be known and may be cited as the “Fair Gift Card Act”.

**History.** Acts 2007, No. 304, § 1.

### 4-88-702. Definitions.

As used in this subchapter:

(1) “Debit card” means any card issued by a financial institution to a consumer for use in initiating an electronic fund transfer from the account of the consumer at the financial institution for the purpose of transferring money between accounts or obtaining money, property, labor, or services;

(2) “Dormancy fee” or “inactivity charge or fee” means a fee, a charge, or a penalty for nonuse or inactivity of a gift certificate, a store gift card, or a prepaid general use card;

(3) “Financial institution” means a state or national bank, a state or federal savings and loan association, a mutual savings bank, a state or

federal credit union, or any other person that, directly or indirectly, holds a transaction account belonging to a consumer;

(4)(A) "General use prepaid card" means a card or other electronic payment device issued by a bank or financial institution that is:

(i) Usable at multiple, unaffiliated merchants or service providers or at automated teller machines;

(ii) Issued in a requested amount whether or not that amount may be, at the option of the issuer, increased in value or reloaded if requested by the holder;

(iii) Purchased or loaded on a prepaid basis; and

(iv) Honored, upon presentation, by merchants for goods or services or at automated teller machines.

(B) "General use prepaid card" does not include:

(i) A debit card that is linked to a demand deposit account or a share draft account; and

(ii) A written promise, plastic card, or other electronic device that is:

(a) Used solely for telephone services; or

(b) Associated with a demand deposit account, checking account, savings account, or similar account in the name of the individual at a bank or financial institution that provides payment solely by debiting the account;

(5)(A) "Gift certificate" means a written promise that is:

(i) Usable at a single merchant or an affiliated group of merchants that share the same name, mark, or logo;

(ii) Issued in a specific amount and cannot be increased;

(iii) Purchased on a prepaid basis in exchange for payment; and

(iv) Honored upon presentation by the single merchant or affiliated group of merchants for goods or services.

(B) "Gift certificate" does not include a written promise, plastic card, or other electronic device that is:

(i) Used solely for telephone services; or

(ii) Associated with a demand deposit account, checking account, savings account, or similar account in the name of the individual at a bank or financial institution that provides payment solely by debiting the account;

(6) "Service fee" means a periodic fee, a charge, or a penalty for holding or use of a gift certificate, a store card, or a prepaid general use card;

(7)(A) "Store gift card" means a plastic card or other electronic payment device that is:

(i) Usable at a single merchant or an affiliated group of merchants that share the same name, mark, or logo;

(ii) Issued in a specified amount and may or may not be increased in value or reloaded;

(iii) Purchased on a prepaid basis in exchange for payment; and

(iv) Honored upon presentation by the single merchant or affiliated group of merchants for goods or services.

(B) "Store gift card" does not include a written promise, plastic card, or other electronic device that is:

(i) Used solely for telephone services; or

(ii) Associated with a demand deposit account, checking account, savings account, or similar account in the name of the individual at a bank or financial institution that provides payment solely by debiting the account; and

(8)(A) "Transaction account" means a deposit or an account on which the depositor or account holder is permitted to make withdrawals by negotiable or transferable instrument, a payment order of withdrawal, telephone transfer, or other similar method for the purpose of making payments or transfers to third persons or others.

(B) "Transaction account" includes demand deposits, negotiable order of withdrawal accounts, savings deposits subject to automatic transfers, and share draft accounts.

**History.** Acts 2007, No. 304, § 1.

#### **4-88-703. Regulation of unfair and deceptive acts and practices in connection with gift cards.**

(a) A person shall not sell or issue a gift certificate, a store gift card, or a general use prepaid card that is subject to an expiration date earlier than two (2) years from the date of issuance or sale of the gift certificate, store gift card, or general use prepaid card.

(b) A dormancy fee, an inactivity charge or fee, or a service fee shall not be charged on a gift certificate, a store gift card, or a general use prepaid card before two (2) years from the date of issuance or sale of the gift certificate, store gift card, or general use prepaid card.

(c) Upon the expiration of the two-year time period referenced in subsection (b) of this section, a gift certificate, a store gift card, or a general use prepaid card may be subject to expiration or a postsale fee, including a service fee, a dormancy fee, an account maintenance fee, a cash-out fee, a gift card replacement fee, an activation fee, or a reactivation fee if the following disclosures are printed clearly in a conspicuous place on the front or back of the gift certificate, the store gift card, or the general use prepaid card in at least 10-point type:

(1) The date on which the gift certificate, the store gift card, or the general use prepaid card expires; and

(2) With respect to a postsale fee:

(A) The amount of the fee;

(B) The circumstances under which the fee will be imposed;

(C) The frequency with which the fee will be imposed; and

(D) Whether the fee is triggered by inactivity.

(d) If the disclosures required by subsection (c) of this section are hidden by the packaging of the gift certificate, the store gift card, or the general use prepaid card, the seller or issuer shall give the purchaser a written statement of the disclosures before the gift certificate, the store gift card, or the general use prepaid card is sold or issued.

(e)(1) If a gift certificate, a store gift card, or a general use prepaid card is sold or issued by electronic means, the seller or issuer shall include a conspicuous written statement of the information required by subsection (c) of this section in the electronic message offering the gift certificate, the store gift card, or the general use prepaid card.

(2) If a gift certificate, a store gift card, or a general use prepaid card is sold or issued by telephonic means, the seller or issuer shall state the information required by subsection (c) of this section to the purchaser.

(f) A term or condition disclosed under subsection (c) of this section shall not be changed after the date of purchase or issuance of the gift certificate, the store gift card, or the general use prepaid card unless the change benefits the holder of the gift certificate, the store gift card, or the general use prepaid card.

**History.** Acts 2007, No. 304, § 1.

#### **4-88-704. Exclusions.**

The prohibitions and requirements of this subchapter shall not apply to gift certificates, store gift cards, or general use prepaid cards that:

(1) Are distributed pursuant to an award, loyalty, or promotional program and for which there is no money or other value exchanged;

(2) Expire not later than thirty (30) days after the date they are sold and are sold below the face value of the gift certificate, the store gift card, or the general use prepaid card to an employer or to a nonprofit or charitable organization for fundraising purposes; or

(3) Are usable with multiple, unaffiliated sellers of goods or services and are issued by a financial institution under § 4-88-702(3).

**History.** Acts 2007, No. 304, § 1.

#### **4-88-705. Enforcement.**

A violation of the provisions of this subchapter shall constitute a deceptive and unconscionable trade practice as defined by § 4-88-101 et seq. and is subject to all the authority, remedies, and penalties granted under those sections.

**History.** Acts 2007, No. 304, § 1.

#### **4-88-706. Rules.**

(a) The State Bank Department shall promulgate rules pertaining to the regulation of state-chartered banks and the selling of gift cards.

(b) The department shall have authority of the sale of gift cards by state-chartered banks and promulgate rules based on guidance issued by the Comptroller of the Currency in the Office of the Comptroller of the Currency Bulletin 2006-34 on August 14, 2006.

**History.** Acts 2007, No. 304, § 1.

## SUBCHAPTER 8 — FAIR DISCLOSURE OF STATE FUNDED PAYMENTS FOR PHARMACISTS' SERVICES ACT

### SECTION.

4-88-801. Title.

4-88-802. Definitions.

### SECTION.

4-88-803. Required practices.

4-88-804. Enforcement.

### 4-88-801. Title.

This subchapter shall be known and may be cited as the "Fair Disclosure of State Funded Payments for Pharmacists' Services Act".

**History.** Acts 2009, No. 769, § 1.

### 4-88-802. Definitions.

As used in this subchapter:

(1) "Pharmacy benefits manager" or "PBM" means an entity that administers or manages a pharmacy benefits plan or program;

(2) "Pharmacy benefits plan or program" means any plan or program that is funded by state dollars to furnish, cover the cost of, or otherwise provide for pharmacist services to individuals who reside or are employed in this state;

(3) "Pharmacist" means a licensed pharmacist as defined in § 17-92-101;

(4) "Pharmacist services" means products, goods, or services provided as a part of the practice of pharmacy as defined in § 17-92-101 to individuals who reside or are employed in this state; and

(5) "Pharmacy" means the same as defined in § 17-92-101.

**History.** Acts 2009, No. 769, § 1.

### 4-88-803. Required practices.

(a) A PBM, when seeking payment or reimbursement for pharmacist services provided in connection with a pharmacy benefits plan or program or reporting expenditures for pharmacist services provided in connection with a pharmacy benefits plan or program, shall itemize by individual claim:

(1) The amount actually paid or to be paid to the pharmacy or pharmacist for the pharmacist services;

(2) The identity of the pharmacy or pharmacist actually paid or to be paid; and

(3) The prescription number or other identifier of the pharmacist services.

(b) A PBM shall pay the amounts it receives for pharmacist services provided in connection with a pharmacy benefits plan or program to the pharmacies or pharmacists that provided the pharmacist services.

(c) This section does not:

(1) Require a PBM to set specific fees, rates, or schedules for payment for pharmacist services;

(2) Prohibit a PBM from charging for any services in addition to pharmacist services; or

(3) Require a PBM to pay a pharmacy or pharmacist more on any claim than the amount disclosed under subdivision (a)(1) of this section.

**History.** Acts 2009, No. 769, § 1.

#### **4-88-804. Enforcement.**

A violation of this subchapter is a deceptive and unconscionable trade practice under the Deceptive Trade Practices Act, § 4-88-101 et seq.

**History.** Acts 2009, No. 769, § 1.

## **CHAPTER 89**

### **HOME SOLICITATION SALES**

#### **SECTION.**

4-89-101. Purpose.

4-89-102. Definitions.

4-89-103. Contracts excepted from chapter.

4-89-104. Penalties.

4-89-105. Damages.

4-89-106. Enforcement of chapter.

4-89-107. Buyer's right to cancel offer or contract.

#### **SECTION.**

4-89-108. Requirements for enforceable sale — Notice of right to cancellation required.

4-89-109. Return of payments and goods by seller.

4-89-110. Return of goods by buyer — Buyer's duty.

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### **RESEARCH REFERENCES**

**U. Ark. Little Rock L.J.** Legislative Survey, Business Law, 4 U. Ark. Little Rock L.J. 579 (1981).

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#### **4-89-101. Purpose.**

The purpose of this chapter is to promote the public welfare by regulating home solicitation sales so that the consumer shall not become a victim of deceptive sales practices.

**History.** Acts 1973, No. 462, § 1; A.S.A. 1947, § 70-914.

#### **4-89-102. Definitions.**

As used in this chapter, unless the context otherwise requires:

(1) "Appropriate trade premises" means premises at which either the owner or seller normally carries on a business or where goods are

normally offered or exposed for sale in the course of business carried on at those premises;

(2) "Deceptive trade practices" means the following acts of a seller in connection with any home solicitation sale, and the following acts constitute a violation of this chapter:

(A) Failure to comply with any requirement of §§ 4-89-107 and 4-89-109; or

(B) Misrepresenting in any manner the consumer's right to cancel; or

(C) Representing directly or indirectly that the seller is primarily conducting or participating in any survey, quiz, or contest or is primarily engaged in any activity other than soliciting business or misrepresenting in any manner the purpose of the call or solicitation; or

(D) Representing directly or indirectly that any offer to sell goods or services is being made only to specially selected persons or misrepresenting in any manner the persons or class of persons afforded the opportunity of purchasing the seller's goods or services; or

(E) Representing directly or indirectly that any sale or service is being offered for any organization, individual, or firm other than the one engaged in soliciting business or misrepresenting in any manner the identity of the solicitor or his or her firm and of the business in which he or she is engaged; or

(F) Representing directly or indirectly that any merchandise or service is free or is provided as a gift or without cost or charge in connection with the purchase of goods or services, unless the price of the goods or services required to be purchased in order to obtain the free merchandise or gift is disclosed; or

(G) Representing directly or indirectly that any price is a special or reduced price, unless it constitutes a significant reduction from the seller's established selling price at which the goods or services have been sold in substantial quantities in the recent and regular course of trade or misrepresenting in any manner the savings which the consumer will receive; or

(H) Failing to disclose clearly and unqualifiedly at the initial contact or solicitation and at all subsequent contacts or solicitations, whether by telephone, written communication, or person-to-person, that the purpose of the contact or solicitation is to sell goods or services; or

(I) Failing to disclose clearly and conspicuously, both orally and in writing in the contract:

(i) The total cash price;

(ii) The down payment;

(iii) The unpaid balance of the cash price;

(iv) The number, amount, and due dates of payments necessary to pay the unpaid balance in full; and

(v) An accurate description of the goods or services purchased;

(3) "Goods" means tangible chattels bought for use primarily for personal, family, or household purposes, including certificates or coupons exchangeable for such goods, and including goods which, at the time of the sale or subsequently, are to be so affixed to real property as to become a part of such real property whether or not severable therefrom;

(4)(A) "Home solicitation sale" means a cash sale or a consumer credit sale of goods, other than insurance, or services in which the seller or a person acting for him or her engages in a personal solicitation of the sale at other than appropriate trade premises in an amount more than twenty-five dollars (\$25.00).

(B) This definition also includes all telephone sales in which the seller has initiated contact, regardless of his or her location, and the consumer's agreement to purchase is made at the consumer's home.

(C) It does not include a sale made pursuant to prior negotiations between the parties at a business establishment, at a fixed location, where goods or services are offered or exhibited for sale, or a sale in which the buyer has initiated the contact and specifically requested the seller to visit his or her home for the purpose of repairing or performing maintenance upon the buyer's personal property. If, in the course of such a visit, the seller sells the buyer the right to receive additional services or goods other than replacement parts necessarily used in performing the maintenance or in making the repairs, the sale of those additional goods or services would not fall within this exclusion.

(D) The term "home solicitation sale" does not include a transaction involving an order for goods to be delivered at one (1) time if:

(i) The order is evidenced only by a sales ticket or invoice which the buyer is not required to sign;

(ii) The buyer makes no payment prior to delivery of the goods;

(iii) The goods are not delivered within three (3) business days of the date of the order;

(iv) The buyer may refuse to accept the goods when they are delivered without incurring any obligation to pay for them or the expenses associated with the transaction, including mailing or shipping charges, or the buyer may, upon inspecting the goods after delivery, return them within three (3) business days to the seller and receive a full refund for any amounts the buyer has paid, including mailing and shipping charges; and

(v) The buyer's right to cancel the order, refuse delivery, or return the goods without obligation or charge is clearly and unmistakably set forth on the face or reverse side of the sales ticket or invoice;

(5) "Seller" means any person, partnership, corporation, or association engaged in the door-to-door or telephone sale of consumer goods or services; and

(6) "Services" means work, labor, or other services furnished primarily for personal, family, or household purposes, including, but not limited to, services in connection with the repair, alteration, or improve-

ment of residential premises, courses of instruction or training regardless of the purpose for which they are taken, and services furnished in connection with the sale or repair of goods, but does not include the services of attorneys, real estate brokers and salesmen, securities dealers or investment counselors, physicians, optometrists, or dentists.

**History.** Acts 1973, No. 462, §§ 2, 7; §§ 70-915, 70-920; Acts 1995, No. 447, 1981, No. 341, §§ 1-3, 5; A.S.A. 1947, § 1.

#### **4-89-103. Contracts excepted from chapter.**

The provisions of this chapter shall not apply to a contract which is executed in connection with the making of emergency repairs or services which are necessary for the immediate protection of persons or real or personal property, or to sales made by a seller who makes seventy-five percent (75%) or more of its sales at its local appropriate trade premises, or to sales made pursuant to credit arrangements existing at the time of the sale.

**History.** Acts 1973, No. 462, § 8; A.S.A. 1947, § 70-921.

#### **4-89-104. Penalties.**

Any person, firm, partnership, corporation, or other entity that knowingly and willfully commits a deceptive trade practice as defined in § 4-89-102(2) shall be guilty of a Class A misdemeanor.

**History.** Acts 1973, No. 462, § 11; A.S.A. 1947, § 70-924; Acts 2005, No. 1994, § 343.

#### **4-89-105. Damages.**

For a violation which is subject to the provisions of this chapter, the consumer shall recover from the persons violating this chapter an amount equal to:

(1) Ten percent (10%) of the transaction total or one hundred dollars (\$100), whichever is greater; and

(2) The actual damages, including any incidental, consequential, and special damages sustained by the consumer as a result of the violation.

**History.** Acts 1973, No. 462, § 9; A.S.A. 1947, § 70-922.

#### **4-89-106. Enforcement of chapter.**

(a)(1) Any home solicitation sale conducted in violation of this chapter shall constitute an unfair and deceptive act or practice as defined by the Deceptive Trade Practices Act, § 4-88-101 et seq.

(2) All remedies, penalties, and authority granted to the Attorney General under the Deceptive Trade Practices Act, § 4-88-101 et seq.,

shall be available to the Attorney General for the enforcement of this chapter.

(b) The prosecuting attorneys of the various districts and counties of this state shall also have full authority to enforce the provisions of this chapter.

(c) Nothing in the provisions of this chapter shall prohibit the bringing of a civil action against a violator of this chapter by an individual harmed by a deceptive trade practice.

**History.** Acts 1973, No. 462, § 10; A.S.A. 1947, § 70-923; Acts 1995, No. 447, § 2.

#### **4-89-107. Buyer's right to cancel offer or contract.**

(a) In addition to any other right to revoke an offer, the buyer has the absolute right to cancel a home solicitation contract or offer until midnight of the third calendar day, excluding Sundays and holidays as declared in § 1-5-101, after the day on which the buyer signs an agreement.

(b) Cancellation occurs when the buyer returns to the seller the notice of cancellation, the notice having been provided for the buyer by the seller. To further protect the consumer, it is suggested that the notice of cancellation be sent by registered mail.

**History.** Acts 1973, No. 462, § 3; A.S.A. 1947, § 70-916.

#### **4-89-108. Requirements for enforceable sale — Notice of right to cancellation required.**

(a) A home solicitation sale is not enforceable by way of action or defense unless there is a writing which:

(1) Is sufficient to indicate that a contract for sale has been made between the parties;

(2) Is signed by both the consumer and the seller;

(3) Contains no provision not included in the oral sales presentation;

(4) Contains the name and address of the seller; and

(5) Contains the date on which the consumer actually signs the writing.

(b) A home solicitation sale is not enforceable by way of action if:

(1) The seller does not provide the consumer with a fully completed copy of the writing at the time the consumer actually signs the writing; or

(2) The seller commits a deceptive trade practice as defined by this chapter.

(c) In a home solicitation sale, the seller must furnish to the buyer at the time he or she signs the sales contract or otherwise agrees to buy consumer goods or services from the seller a completed form in duplicate, captioned "NOTICE OF CANCELLATION", which shall be

attached to the contract or receipt and easily detachable and which shall contain in 10-point bold face type the following information and statements:

**"NOTICE OF CANCELLATION**

(Enter date of transaction)

You are entitled to cancel the agreement or offer referred to above at any time prior to midnight of the third day, excluding Sundays and holidays, after the day you signed the agreement or offer. In the event you cancel, the seller must return to you (1) any payments made; (2) any goods or other property (or a sum equal to the amount of the trade-in allowance given therefor); and (3) any note or other evidence of indebtedness, given by you to the seller pursuant to or in connection with the agreement or offer. After cancellation, the seller is entitled to receive back from you at your address any goods previously delivered by him or her to you in substantially the same condition as delivered, providing he or she has returned any payments and goods or other property received from you, to the extent indicated above. If the seller does not call for his or her goods at your address within twenty (20) days after you give notice of cancellation, you may keep them as your own.

**TO CANCEL THIS TRANSACTION, MAIL OR DELIVER A SIGNED AND DATED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE TO**

(Name of seller) AT

**NOT LATER THAN MIDNIGHT OF**

(Date)

**I HEREBY CANCEL THIS TRANSACTION**

(Buyer's signature)."

(d) If seller fails to give both oral and written notice of the buyer's right to cancellation, the cooling-off period does not begin to run until actual notice is given, and the buyer is no longer obliged to return the goods in substantially the same condition.

**History.** Acts 1973, No. 462, § 4; 1981, No. 341, § 4; 1985, No. 556, § 1; A.S.A. 1947, § 70-917.

**4-89-109. Return of payments and goods by seller.**

(a) Within ten (10) days after a home solicitation contract or offer has been cancelled, the seller must tender to the buyer any payments made by the buyer and any note or other evidence of indebtedness.

(b) If the down payment includes goods traded in, the goods must be tendered in substantially as good condition as when received. If the seller fails to tender the goods as provided by this section, the buyer may elect to recover an amount equal to the trade-in allowance stated in the agreement.

(c) Until the seller has complied with the obligations imposed by this section, the buyer may retain possession of goods delivered to him or

her by the seller and has a lien on the goods for any recovery to which he or she is entitled.

**History.** Acts 1973, No. 462, § 5; A.S.A. 1947, § 70-918.

#### **4-89-110. Return of goods by buyer — Buyer's duty.**

(a)(1) Within twenty (20) days after a home solicitation contract or offer has been cancelled, the buyer, upon demand, must tender to the seller any goods delivered by the seller pursuant to the sale or offer, but he or she is not obligated to tender at any place other than his or her own address.

(2) If the seller fails to demand possession of goods within twenty (20) days after cancellation, the goods become the property of the buyer without obligation to pay for them.

(b)(1) The buyer has a duty to take reasonable care of the goods in his or her possession both prior to cancellation and during the twenty-day period following.

(2) During the twenty-day period after cancellation, except for the buyer's duty of care, the goods are at the seller's risk.

**History.** Acts 1973, No. 462, § 6; A.S.A. 1947, § 70-919.

## **CHAPTER 90 AUTOMOBILES**

### **SUBCHAPTER.**

1. GENERAL PROVISIONS. [RESERVED.]
2. ODOMETER REGULATIONS.
3. AFTERMARKET CRASH PARTS.
4. NEW MOTOR VEHICLE QUALITY ASSURANCE ACT.
5. MOTOR VEHICLE SERVICE CONTRACT ACT.
6. CONSUMER MOTOR VEHICLE LEASING ACT. [REPEALED.]
7. DEBT CANCELLATION AGREEMENTS.

### **SUBCHAPTER 1 — GENERAL PROVISIONS**

[Reserved]

### **SUBCHAPTER 2 — ODOMETER REGULATIONS**

#### **SECTION.**

- 4-90-201. Legislative intent and purpose.
- 4-90-202. Definitions.
- 4-90-203. Penalties and enforcement.
- 4-90-204. Preventing tampering.
- 4-90-205. Service, repair, and replacement.

#### **SECTION.**

- 4-90-206. Disclosure requirements on transfer of a motor vehicle.
- 4-90-207. Civil actions by private persons.

**Publisher's Notes.** Former subchapter 2, concerning odometer regulations, was repealed by Acts 1995, No. 795, § 11. The former subchapter was derived from the following sources:

4-90-201. Acts 1975, No. 527, § 1; A.S.A. 1947, § 75-2401.

4-90-202. Acts 1975, No. 527, § 4; A.S.A. 1947, § 75-2404; Acts 1993, No. 1047, § 1.

4-90-203. Acts 1975, No. 527, § 4; A.S.A. 1947, § 75-2404.

4-90-204. Acts 1975, No. 527, § 2; A.S.A. 1947, § 75-2402.

4-90-205. Acts 1975, No. 527, § 2; A.S.A. 1947, § 75-2402.

4-90-206. Acts 1975, No. 527, § 3; A.S.A. 1947, § 75-2403; Acts 1989, No. 415, § 1.

## RESEARCH REFERENCES

**Am. Jur.** 17 Am. Jur. 2d, Cons. & Bor. Pro., § 364 et seq.

8 Am. Jur. 2d, Auto., §§ 220, 221.

17 Am. Jur. 2d, Con. & Borr. Prot., § 299.

**C.J.S.** 37 C.J.S., Fraud, § 9 et seq.

37 C.J.S., Fraud, §§ 12, 91.

**U. Ark. Little Rock L.J.** Survey — Criminal Law, 12 U. Ark. Little Rock L.J. 183.

## CASE NOTES

### In General.

The federal act regulating odometers, codified as 15 U.S.C. § 1981 et seq., is

very similar to this subchapter. *Boren v. State*, 297 Ark. 220, 761 S.W.2d 885 (1988) (decision under prior law).

### 4-90-201. Legislative intent and purpose.

The General Assembly recognizes that a motor vehicle is a major consumer acquisition and that buyers of motor vehicles rely heavily on the odometer reading as an index of the condition and value of a vehicle. The General Assembly further recognizes that buyers are entitled to rely on the odometer reading as an accurate indication of the mileage of the motor vehicle and that an accurate indication of the mileage assists a buyer in deciding on the safety and reliability of the vehicle. The purposes of this subchapter are to prohibit tampering with motor vehicle odometers and to provide safeguards to protect purchasers in the sale of motor vehicles with altered or reset odometers. It is the intent of the General Assembly that this subchapter incorporate certain provisions of newly codified federal law to supplement existing Arkansas law. To that end, any rule or regulation in effect under a law replaced by this subchapter continues in effect under the corresponding provision enacted by this subchapter until repealed, amended, or superseded. In addition, where no substantive change in law has occurred, an action taken or an offense committed under a law replaced by a section of this subchapter is deemed to have been taken or committed under the corresponding provision enacted by this subchapter.

**History.** Acts 1995, No. 795, § 1.

**CASE NOTES**

**Cited:** Colding v. Williams, 53 Ark. App. 173, 920 S.W.2d 507 (1996).

**4-90-202. Definitions.**

As used in this subchapter, unless the context otherwise requires:

(1) "Auction company" means a person taking possession of a motor vehicle owned by another to sell at an auction;

(2) "Dealer" means a person that sold at least five (5) motor vehicles during the prior twelve (12) months to buyers that in good faith bought the vehicles other than for resale;

(3) "Distributor" means a person that sold at least five (5) motor vehicles during the prior twelve (12) months for resale;

(4) "Leased motor vehicle" means a motor vehicle leased to a person for at least four (4) months by a lessor that leased at least five (5) vehicles during the prior twelve (12) months;

(5) "Motor vehicle" means any self-propelled vehicle not operated exclusively upon railroad tracks, except snowmobiles and other devices designed and used primarily for the transportation of persons over natural terrain, snow, or ice and propelled by wheels, skis, tracks, runners, or whatever other means;

(6) "Odometer" means an instrument for measuring and recording the distance a motor vehicle is driven, but does not include an auxiliary instrument designed to be reset by the operator of the vehicle to record the mileage of a trip;

(7) "Person" means an individual, firm, partnership, incorporated and unincorporated association, or any other legal or commercial entity;

(8) "Repair" and "replace" mean to restore to a sound working condition by replacing any part of an odometer or by correcting any inoperative part of an odometer;

(9) "Title" means the certificate of title or other document issued by this state or another state and indicating ownership, and includes a manufacturer's statement or certificate of origin; and

(10) "Transfer" means to change ownership by sale, gift, or other means.

**History.** Acts 1995, No. 795, § 2.

**4-90-203. Penalties and enforcement.**

(a)(1)(A) When a person violates this subchapter or a regulation prescribed under this subchapter, the violation shall constitute an unfair or deceptive act or practice as defined by the Deceptive Trade Practices Act, § 4-88-101 et seq.

(B) All remedies, penalties, and authority granted to the Attorney General under the Deceptive Trade Practices Act, § 4-88-101 et seq.,

shall be available to the Attorney General for the enforcement of this subchapter, including, but not limited to, an action to:

(i) Enjoin the violation; and

(ii) Recover:

(a) Amounts for which the person is liable under § 4-90-207(a) to each private person; and

(b) Costs, investigative costs, and reasonable attorney's fees.

(2)(A) An action under this subsection may be brought in an appropriate court of competent jurisdiction in the county in which the person resides or transacts business or in the judicial district in which the state capital is located.

(B) The action must be brought not later than five (5) years after the claim accrues.

(b)(1) Any person who is found to have violated this subchapter shall be guilty of a felony and imprisoned for not more than three (3) years and subject to a fine of not more than fifty thousand dollars (\$50,000) for each violation.

(2) If the person is a corporation, the penalties of this subsection also apply to a director, officer, or individual agent of a corporation who knowingly and willfully authorizes, orders, or performs an act in violation of this subchapter or a regulation prescribed or order issued under this subchapter, without regard to penalties imposed on the corporation.

**History.** Acts 1995, No. 795, § 6.

## CASE NOTES

### ANALYSIS

**Attorney's Fees.**  
Damages.

#### **Attorney's Fees.**

The amount of attorney's fees awarded lies within the broad discretion of the trial court; the trial judge is in a superior position to determine a reasonable attorney's fee because of his acquaintance with the record and the quality of services rendered. *Caldwell v. Jenkins*, 42 Ark. App. 157, 856 S.W.2d 37 (1993).

While there is no fixed formula to be used in setting a reasonable fee, the Su-

preme Court has adopted the list of factors to be considered set out in the American Bar Association's Code of Professional Responsibility; the factors include the time and labor required and the results obtained. *Caldwell v. Jenkins*, 42 Ark. App. 157, 856 S.W.2d 37 (1993).

#### **Damages.**

Plaintiff awarded \$5,000, the difference in value between the vehicle as warranted, with approximately 9,000 miles, and the vehicle with its actual mileage of 109,000. *Colding v. Williams*, 53 Ark. App. 173, 920 S.W.2d 507 (1996).

## **4-90-204. Preventing tampering.**

A person may not:

(1) Advertise for sale, sell, use, install, or have installed, a device that makes an odometer of a motor vehicle register a mileage different from the mileage the vehicle was driven, as registered by the odometer within the designed tolerance of the manufacturer of the odometer;

(2) Disconnect, reset, alter, or have disconnected, reset, or altered, an odometer of a motor vehicle intending to change the mileage registered by the odometer;

(3) With the intent to defraud, operate a motor vehicle on a public street, road, or highway, if the person knows that the odometer of the vehicle is disconnected or not operating; or

(4) Conspire to violate any provision of this subchapter.

**History.** Acts 1995, No. 795, § 3.

#### CASE NOTES

**Knowledge.**

Whether a person has sold a motor vehicle with knowledge that the mileage registered on the odometer has been al-

tered is a question of fact. *Caldwell v. Jenkins*, 42 Ark. App. 157, 856 S.W.2d 37 (1993).

#### 4-90-205. Service, repair, and replacement.

(a)(1) A person may service, repair, or replace an odometer of a motor vehicle if the mileage registered by the odometer remains the same as before the service, repair, or replacement.

(2) If the mileage cannot remain the same:

(A) The person shall adjust the odometer to zero; and

(B) The owner of the vehicle or agent of the owner shall attach a written notice to the left door frame of the vehicle specifying the mileage before the service, repair, or replacement and the date of the service, repair, or replacement.

(b) A person may not, with the intent to defraud, remove or alter a notice attached to a motor vehicle as required by this section.

**History.** Acts 1995, No. 795, § 4.

#### 4-90-206. Disclosure requirements on transfer of a motor vehicle.

(a)(1) A person transferring his or her ownership of a motor vehicle shall give the transferee a written disclosure:

(A) Of the cumulative mileage registered by the odometer; or

(B) That the mileage is not actual, if the transferor knows that the mileage registered by the odometer is incorrect.

(2) A person making a written disclosure required by a regulation prescribed under subdivision (a)(1) of this section may not make a false statement in the disclosure.

(3) A person acquiring a motor vehicle for resale may accept a disclosure under this section only if it is complete.

(4) The Director of the Department of Finance and Administration shall adopt, pursuant to the Arkansas Administrative Procedure Act, § 25-15-201 et seq., rules not inconsistent with this subchapter or Title 49, Chapter 327 of the United States Code, or any rules promulgated

thereunder prescribing the manner in which the written disclosure shall be made.

(b)(1) A motor vehicle, the ownership of which is transferred, may not be licensed for use in this state unless the transferee, in submitting an application for the title on which the license will be issued, includes with the application the transferor's title and, if that title contains the appropriate space, the transferor's disclosure of the mileage at the time of transfer, and the signature and the date of the disclosure.

(2)(A) If the title to a motor vehicle issued to a transferor is in the possession of a lienholder when the transferor transfers ownership of the vehicle, the transferor may use a written power of attorney in making the mileage disclosure required under subsection (a) of this section.

(B) The director shall adopt, pursuant to the Arkansas Administrative Procedure Act, § 25-15-201 et seq., rules not inconsistent with this subchapter or Title 49, Chapter 327 of the United States Code, or any rules promulgated thereunder prescribing the form of the power of attorney.

(C) The provisions of §§ 4-90-203 and 4-90-207(a) apply to a person granting or granted a power of attorney under this subdivision (b)(2).

(c)(1) For a leased motor vehicle, the lessee shall provide the written disclosure required by subsection (a) of this section to the lessor when the lessor transfers ownership of that vehicle.

(2) The lessor shall provide written notice to the lessee of:

(A) The mileage disclosure requirements of subsection (a) of this section; and

(B) The penalties for failure to comply with those requirements.

(3) The lessor shall retain the disclosures made by a lessee under subdivision (c)(1) of this section for at least four (4) years following the date the lessor transfers the leased motor vehicle.

(4) If the lessor transfers ownership of a leased motor vehicle without obtaining possession of the vehicle, the lessor, in making the disclosure required by subsection (a) of this section, may indicate on the title the mileage disclosed by the lessee under subdivision (c)(1) of this section, unless the lessor has reason to believe that the disclosure by the lessee does not reflect the actual mileage of the vehicle.

(d) If a motor vehicle is sold at an auction, the auction company conducting the auction shall maintain the following records for at least four (4) years after the date of the sale:

(1) The name and address of the most recent owner of the motor vehicle, except the auction company;

(2) The name and address of the buyer of the motor vehicle;

(3) The vehicle identification number of the motor vehicle; and

(4) The odometer reading on the date the auction company took possession of the motor vehicle.

**History.** Acts 1995, No. 795, § 5; 1997, No. 809, § 5.

United States Code, referred to in this section, is 49 U.S.C. § 32701 et seq.

**U.S. Code.** Title 49, Chapter 327 of the

**CASE NOTES**

**ANALYSIS**

Knowledge.  
Violation Shown.

**Knowledge.**

Liability of car seller under subsection (a) of a prior similar provision did not depend upon her actual knowledge. Hin-

son v. Eaton, 322 Ark. 331, 908 S.W.2d 646 (1995).

**Violation Shown.**

Seller's failure to disclose actual mileage held to be intentional misrepresentation rather than negligence. Colding v. Williams, 53 Ark. App. 173, 920 S.W.2d 507 (1996).

**4-90-207. Civil actions by private persons.**

(a)(1) A person who violates this subchapter or a regulation prescribed under this subchapter with intent to defraud is liable for three (3) times the actual damages or one thousand five hundred dollars (\$1,500), whichever is greater.

(2)(A) A person may bring a civil action to enforce a claim under this subsection in an appropriate court of competent jurisdiction.

(B) The action must be brought not later than five (5) years after the claim accrues.

(C) The court shall award costs and a reasonable attorney's fee to the person when a judgment is entered for that person.

(b) Nothing in this subchapter, however, shall in any way limit any other statutory or common law rights, causes of actions, or remedies which are otherwise available to a person, including, but not limited to, actions for:

- (1) Breach of warranty;
- (2) Fraud;
- (3) Negligent misrepresentation;
- (4) Intentional misrepresentation;
- (5) Deceptive trade practices actions;
- (6) Rescission; or
- (7) Revocation of acceptance.

**History.** Acts 1995, No. 795, §§ 7, 8.

**SUBCHAPTER 3 — AFTERMARKET CRASH PARTS**

**SECTION.**

4-90-301. Legislative intent.

4-90-302. Definitions.

4-90-303. Penalties.

4-90-304. Required identification.

**SECTION.**

4-90-305. Repair estimates.

4-90-306. Repairs.

4-90-307. Insurance.

#### **4-90-301. Legislative intent.**

This subchapter is intended to apply only to parts that are aftermarket crash parts as defined in this subchapter and to the documents prepared in the repair estimate process. It is not intended to apply to any mechanical automotive parts or used parts of any kind or to any invoice or final invoicing forms.

**History.** Acts 1991, No. 1209, § 5.

#### **4-90-302. Definitions.**

As used in this subchapter:

(1) "Aftermarket crash part" means a replacement for any of the nonmechanical sheet metal or plastic parts which generally constitute the exterior of a motor vehicle, including inner and outer panels;

(2) "Installer" means an individual who performs the work of replacing or repairing parts of a motor vehicle;

(3) "Insurer" means an insurance company and any person authorized to represent the insurer with respect to a claim and who is acting within the scope of the person's authority;

(4) "Nonoriginal equipment manufacturer aftermarket crash part" means an aftermarket crash part made by any manufacturer other than the original vehicle manufacturer or his or her suppliers; and

(5) "Repair facility" means a motor vehicle dealer, garage, body shop, or other commercial entity which undertakes the repair or replacement of those parts that generally constitute the exterior of a motor vehicle.

**History.** Acts 1991, No. 1209, § 1.

#### **4-90-303. Penalties.**

Any person who violates any provision of this subchapter shall, upon conviction, be guilty of a violation and shall be subject to the penalty prescribed in § 5-4-201(c)(1).

**History.** Acts 1991, No. 1209, § 4.

#### **4-90-304. Required identification.**

Any nonoriginal equipment manufacturer aftermarket crash part manufactured or supplied for use in this state on or after January 1, 1992, shall have affixed thereto or inscribed thereon the logo, identification number, or name of its manufacturer. The manufacturer's logo, identification number, or name shall be visible after installation whenever practicable.

**History.** Acts 1991, No. 1209, § 2.

**4-90-305. Repair estimates.**

(a) In all instances where nonoriginal equipment manufacturer aftermarket crash parts are used in preparing an estimate for repairs, the written estimate prepared by the insurer or repair facility shall clearly identify such parts.

(b) A disclosure document attached to the estimate shall contain the following information in no smaller than 10-point type:

“THIS ESTIMATE HAS BEEN PREPARED BASED ON THE USE OF AFTERMARKET CRASH PARTS SUPPLIED BY A SOURCE OTHER THAN THE MANUFACTURER OF YOUR MOTOR VEHICLE. THE AFTERMARKET CRASH PARTS USED IN THE PREPARATION OF THIS ESTIMATE ARE WARRANTED BY THE MANUFACTURER OR DISTRIBUTOR OF SUCH PARTS INSTEAD OF THE MANUFACTURER OF YOUR VEHICLE.”

**History.** Acts 1991, No. 1209, § 3.

**4-90-306. Repairs.**

Whenever repairs are made involving replacement crash parts, as defined in this subchapter, and the vehicle is still under the manufacturer's original warranty, only original equipment manufacturer replacement crash parts may be used by the repair facility unless the owner gives or has given written consent otherwise.

**History.** Acts 1997, No. 835, § 1.

**4-90-307. Insurance.**

Every insurer that writes motor vehicle insurance and that intends to require or specify the use of aftermarket parts must disclose to its policyholders in writing, either in the policy or on an attached sticker, the following information in no smaller than 10-point type:

“IN THE REPAIR OF YOUR COVERED MOTOR VEHICLE UNDER THE PHYSICAL DAMAGE COVERAGE PROVISIONS OF THIS POLICY, WE MAY REQUIRE OR SPECIFY THE USE OF MOTOR VEHICLE PARTS NOT MADE BY THE ORIGINAL MANUFACTURER. THESE PARTS ARE REQUIRED TO BE AT LEAST EQUAL IN TERMS OF FIT, QUALITY, PERFORMANCE, AND WARRANTY TO THE ORIGINAL MANUFACTURER PARTS THEY REPLACE.”

**History.** Acts 1997, No. 835, § 1.

**SUBCHAPTER 4 — NEW MOTOR VEHICLE QUALITY ASSURANCE ACT****SECTION.**

4-90-401. Title.

4-90-402. Legislative determinations and intent.

4-90-403. Definitions.

**SECTION.**

4-90-404. Notice by consumer — Disclosure by manufacturer, agent, or dealer.

4-90-405. Required warranty repairs.

## SECTION.

- 4-90-406. Failure to make required repairs.  
 4-90-407. Refunds.  
 4-90-408. Reimbursement of towing and rental costs.  
 4-90-409. Option to retain use of vehicle.  
 4-90-410. Presumption of reasonable attempts to repair — Extension of time to repair in case of war, invasion, strike, fire, flood, or natural disaster.

## SECTION.

- 4-90-411. Diagnosis or repair — Documentation.  
 4-90-412. Resale of returned nonconforming vehicle.  
 4-90-413. Affirmative defenses.  
 4-90-414. Informal proceeding as precedent.  
 4-90-415. Enforcement — Exclusivity — Costs and expenses.  
 4-90-416. Time limitation for commencement of action.  
 4-90-417. Deceptive trade practices.

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### RESEARCH REFERENCES

**U. Ark. Little Rock L.J.** Legislative Survey, Miscellaneous, 16 U. Ark. Little Rock L.J. 161.

Note, Arkansas's New Motor Vehicle Quality Assurance Act — A Branch of

Hope For Lemon Owners, 16 U. Ark. Little Rock L.J. 493.

#### 4-90-401. Title.

This subchapter shall be known and may be cited as the "Arkansas New Motor Vehicle Quality Assurance Act".

**History.** Acts 1993, No. 285, § 1; 1993, No. 297, § 1.

#### 4-90-402. Legislative determinations and intent.

The General Assembly recognizes that a motor vehicle is a major consumer acquisition and that a defective motor vehicle undoubtedly creates a hardship for the consumer. The General Assembly further recognizes that a duly franchised motor vehicle dealer is an authorized service agent of the manufacturer. It is the intent of the General Assembly that a good-faith motor vehicle warranty complaint by a consumer be resolved by the manufacturer within a specified period of time. It is further the intent of the General Assembly to provide the statutory procedures whereby a consumer may receive a replacement motor vehicle or a full refund for a motor vehicle which cannot be brought into conformity with the warranty during the motor vehicle quality assurance period provided for in this subchapter. However, nothing in this subchapter shall in any way limit the rights or remedies which are otherwise available to a consumer under any other law.

**History.** Acts 1993, No. 285, § 2; 1993, No. 297, § 2; 2001, No. 1134, § 1.

**4-90-403. Definitions.**

As used in this subchapter, unless the context otherwise requires:

(1) "Calendar day" means any day of the week other than a legal holiday;

(2) "Collateral charges" means those additional charges to a consumer wholly incurred as a result of the acquisition of the motor vehicle. For the purposes of this subchapter, collateral charges include, but are not limited to, manufacturer-installed or agent-installed items, earned finance charges, sales taxes, title charges, and charges for extended warranties provided by the manufacturer, its subsidiary, or agent;

(3) "Condition" means a general problem that may be attributable to a defect in more than one (1) part;

(4) "Consumer" means the purchaser or lessee, other than for the purposes of lease or resale, of a new or previously untitled motor vehicle or any other person entitled to enforce the obligations of the warranty during the duration of the motor vehicle quality assurance period, provided the purchaser has titled and registered the motor vehicle as prescribed by law;

(5) "Incidental charges" means those reasonable costs incurred by the consumer, including, but not limited to, towing charges and the costs of obtaining alternative transportation which are directly caused by the nonconformity or nonconformities which are the subject of the claim, but shall not include loss of use, loss of income, or personal injury claims;

(6) "Lease price" means the aggregate of:

(A) The lessor's actual purchase costs;

(B) Collateral charges, if applicable;

(C) Any fee paid to another person to obtain the lease;

(D) Any insurance or other costs expended by the lessor for the benefit of the lease;

(E) An amount equal to state and local sales taxes, not otherwise included as collateral charges, paid by the lessor when the vehicle was initially purchased; and

(F) An amount equal to five percent (5%) of the lessor's actual purchase price;

(7) "Lessee" means any consumer who leases a motor vehicle for one (1) year or more pursuant to a written lease agreement which provides that the lessee is responsible for repairs to the motor vehicle;

(8) "Lessee cost" means the aggregate deposit and rental payments previously paid to the lessor for the leased vehicle;

(9) "Lessor" means a person who holds title to a motor vehicle leased to a lessee under the written lease agreement or who holds the lessor's rights under such agreement;

(10) "Manufacturer" means:

(A) Any person who is engaged in the business of constructing or assembling new motor vehicles or installing on previously assembled

vehicle chassis special bodies or equipment which, when installed, form an integral part of the new motor vehicle; or

(B) In the case of motor vehicles not manufactured in the United States, any person who is engaged in the business of importing new motor vehicles into the United States for the purpose of selling or distributing new motor vehicles to new motor vehicle dealers;

(11)(A) "Motor vehicle" or "vehicle" means any self-propelled vehicle licensed, purchased, or leased in this state primarily designed for the transportation of persons or property over the public streets and highways.

(B) "Motor vehicle" or "vehicle" does not include:

(i) Mopeds;

(ii) Motorcycles;

(iii) The living facilities of a motor home;

(iv)(a) Vehicles over thirteen thousand pounds (13,000 lbs.) gross vehicle weight rating.

(b) For purposes of this subchapter, the limit of thirteen thousand pounds (13,000 lbs.) gross vehicle weight rating does not apply to motor homes; or

(v) A vehicle over ten thousand pounds (10,000 lbs.) gross vehicle weight rating that has been substantially altered after its initial sale from a dealer to the person;

(12) "Motor vehicle quality assurance period" means a period of time that:

(A) Begins:

(i) On the date of original delivery of a motor vehicle; or

(ii) In the case of a replacement vehicle provided by a manufacturer to a consumer under this subchapter, on the date of delivery of the replacement vehicle to the consumer; and

(B) Ends twenty-four (24) months after the date of the original delivery of the motor vehicle to a consumer, or the first twenty-four thousand (24,000) miles of operation attributable to the consumer, whichever is later;

(13) "Nonconformity" means any specific or generic defect or condition or any concurrent combination of defects or conditions that:

(A) Substantially impairs the use, market value, or safety of a motor vehicle; or

(B) Renders the motor vehicle nonconforming to the terms of an applicable manufacturer's express warranty or implied warranty of merchantability;

(14) "Person" means any natural person, partnership, firm, corporation, association, joint venture, trust, or other legal entity;

(15) "Purchase price" means the cash price paid for the motor vehicle appearing in the sales agreement or contract, including any net allowance for a trade-in vehicle;

(16) "Replacement motor vehicle" means a motor vehicle which is identical or reasonably equivalent to the motor vehicle to be replaced, as the motor vehicle replaced existed at the time of the original acquisition; and

(17) “Warranty” means any written warranty issued by the manufacturer or any affirmation of fact or promise made by the manufacturer, excluding statements made by the dealer, in connection with the sale or lease of a motor vehicle to a consumer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is free of defects or will meet a specified level of performance.

**History.** Acts 1993, No. 285, § 3; 1993, No. 297, § 3; 1995, No. 302, § 1; 2001, No. 1134, § 2; 2009, No. 322, § 1; 2009, No. 492, § 1.

**Amendments.** The 2009 amendment by act No. 322 redesignated (11), substituted “thirteen thousand pounds (13,000 lbs.)” for “ten thousand pounds (10,000 lbs.)” in (11)(B)(iv)(a) and (11)(B)(iv)(b), substituted “subchapter” for “definition”

in (11)(B)(iv)(b), and made related and minor stylistic changes.

The 2009 amendment by act No. 492 in (11), inserted (11)(B)(v), redesignated the remainder of the subsection, substituted “thirteen thousand pounds (13,000 lbs.)” for “ten thousand pounds (10,000 lbs.)” in (11)(B)(iv)(a) and (11)(B)(iv)(b), and made related changes.

#### **4-90-404. Notice by consumer — Disclosure by manufacturer, agent, or dealer.**

(a)(1) A consumer shall utilize the informal dispute settlement proceeding provided for in this subchapter prior to bringing any legal action to enforce the consumer’s rights under this subchapter, if the manufacturer has made the disclosure required by subsection (b) of this section.

(2) However, if the manufacturer has not made the required disclosure, the consumer is not required to utilize the informal dispute settlement procedure pursuant to § 4-90-414 prior to any legal action to enforce the consumer’s rights under this subchapter.

(b)(1)(A) At the time of the consumer’s purchase or lease of the vehicle, the manufacturer, its agent, or an authorized dealer shall provide to the consumer a written statement that explains the consumer’s rights and obligations under this subchapter.

(B) The manufacturer’s authorized dealer shall obtain the consumer’s signed acknowledgement of the receipt of the written statement explaining the consumer’s rights and obligations under this subchapter.

(C) The manufacturer’s authorized dealer shall maintain copies of the consumer’s signed acknowledgement for a period of no fewer than five (5) years.

(2) The written statement shall be prepared by the Consumer Protection Division of the Office of the Attorney General and shall include the telephone number of the division that the consumer can contact to obtain information regarding his or her rights and obligations under this subchapter.

(3) For each failure of the manufacturer, its agent, or an authorized dealer to provide to a consumer the written statement required under this section or failure to retain a signed acknowledgement form, the manufacturer shall be liable to the State of Arkansas for a civil penalty

of not less than twenty-five dollars (\$25.00) nor more than one thousand dollars (\$1,000).

(c)(1) The manufacturer shall clearly and conspicuously disclose to the consumer, in the warranty or owner's manual, that written notice of the nonconformity is required before the buyer may be eligible for a refund or replacement of the vehicle.

(2) The manufacturer shall provide the consumer with conspicuous notice of the address and phone number for its zone, district, or regional office for this state at the time of vehicle acquisition, to which the buyer must send notification.

**History.** Acts 1993, No. 285, § 5; 1993, No. 297, § 5; 1995, No. 302, § 2; 2001, No. 1134, § 3.

#### **4-90-405. Required warranty repairs.**

If a motor vehicle does not conform to the warranty and the consumer reports the nonconformity to the manufacturer, its agent, or authorized dealer during the motor vehicle quality assurance period, the manufacturer, its agent, or authorized dealer shall make repairs as are necessary to correct the nonconformity, even if the repairs are made after the expiration of the term of protection.

**History.** Acts 1993, No. 285, § 4; 1993, No. 297, § 4; 2001, No. 1134, § 4.

#### **4-90-406. Failure to make required repairs.**

(a)(1) After three (3) attempts have been made to repair the same nonconformity that substantially impairs the motor vehicle, or after one (1) attempt to repair a nonconformity that is likely to cause death or serious bodily injury, the consumer shall give written notification, by certified or registered mail, to the manufacturer of the need to repair the nonconformity in order to allow the manufacturer a final attempt to cure the nonconformity.

(2) The manufacturer shall, within ten (10) days after receipt of the notification, notify and provide the consumer with the opportunity to have the vehicle repaired at a reasonably accessible repair facility, and, after delivery of the vehicle to the designated repair facility by the consumer, the manufacturer shall, within ten (10) days, conform the motor vehicle to the warranty.

(3) If the manufacturer fails to notify and provide the consumer with the opportunity to have the vehicle repaired at a reasonably accessible repair facility or fails to perform the repairs within the time periods prescribed in this subsection, the requirement that the manufacturer be given a final attempt to cure the nonconformity does not apply and a nonrebuttable presumption of a reasonable number of attempts to repair arises.

(b)(1)(A) If the manufacturer, its agent, or authorized dealer has not conformed the motor vehicle to the warranty by repairing or correct-

ing one (1) or more nonconformities that substantially impair the motor vehicle after a reasonable number of attempts, the manufacturer, within forty (40) days, shall:

(i) At the time of its receipt of payment of a reasonable offset for use by the consumer, replace the motor vehicle with a replacement motor vehicle acceptable to the consumer; or

(ii) Repurchase the motor vehicle from the consumer or lessor and refund to the consumer or lessor the full purchase price or lease price, less a reasonable offset for use and less a reasonable offset for physical damage sustained to the vehicle while under the ownership of the consumer.

(B) The replacement or refund shall include payment of all collateral and reasonably incurred incidental charges.

(2)(A) The consumer shall have an unconditional right to choose a refund rather than a replacement.

(B) At the time of the refund or replacement, the consumer, lienholder, or lessor shall furnish to the manufacturer clear title to and possession of the motor vehicle.

(3) The amount of reasonable offset for use by the consumer shall be determined by multiplying the actual price of the new motor vehicle paid or payable by the consumer, including any charges for transportation and manufacturer-installed or agent-installed options, by a fraction having as its denominator one hundred twenty thousand (120,000) and having as its numerator the number of miles traveled by the new motor vehicle prior to the time the buyer first delivered the vehicle to the manufacturer, its agent, or authorized dealer for correction of the problem that gave rise to the nonconformity.

**History.** Acts 1993, No. 285, § 6; 1993, No. 297, § 6; 1995, No. 302, § 3.

#### **4-90-407. Refunds.**

(a)(1) Refunds shall be made to the consumer and lienholder of record, if any, as their interests may appear.

(2) If applicable, refunds shall be made to the lessor and lessee as follows:

(A) The lessee shall receive the lessee cost less a reasonable offset for use; and

(B) The lessor shall receive the lease price less the aggregate deposit and rental payments previously paid to the lessor for the leased vehicle.

(b) If the manufacturer makes a refund to the lessor or lessee pursuant to this subchapter, the consumer's lease agreement with the lessor shall be terminated upon payment of the refund and no penalty for early termination shall be assessed.

(c) If a replaced vehicle was financed by the manufacturer, its subsidiary, or agent, the manufacturer, subsidiary, or agent may not require the buyer to enter into any refinancing agreement concerning a

replacement vehicle that would create any financial obligations upon the buyer beyond those of the original financing agreement.

**History.** Acts 1993, No. 285, § 7; 1993, No. 297, § 7. on vehicles returned as defective, § 26-52-515.

**Cross References.** Refund of sales tax

#### **4-90-408. Reimbursement of towing and rental costs.**

Whenever a vehicle is replaced or refunded under this subchapter, the manufacturer shall reimburse the consumer for necessary towing and rental costs actually incurred as a direct result of the nonconformity.

**History.** Acts 1993, No. 285, § 10; 1993, No. 297, § 10.

#### **4-90-409. Option to retain use of vehicle.**

A consumer has the option of retaining the use of any vehicle returned under this subchapter until the time that the consumer has been tendered a full refund or a replacement vehicle of comparable value.

**History.** Acts 1993, No. 285, § 11; 1993, No. 297, § 11.

#### **4-90-410. Presumption of reasonable attempts to repair — Extension of time to repair in case of war, invasion, strike, fire, flood, or natural disaster.**

(a) A rebuttable presumption of a reasonable number of attempts to repair is considered to have been undertaken to correct a nonconformity if:

(1) The nonconformity has been subject to repair as provided in § 4-90-406(a), but the nonconformity continues to exist;

(2) The vehicle is out of service by reason of repair, or attempt to repair, any nonconformity for a cumulative total of thirty (30) calendar days; or

(3) There have been five (5) or more attempts on separate occasions to repair any nonconformities that together substantially impair the use and value of the motor vehicle to the consumer.

(b)(1) The thirty (30) calendar days in subdivision (a)(2) of this section shall be extended by any period of time during which repair services are not available as a direct result of war, invasion, strike, fire, flood, or natural disaster.

(2) The manufacturer, its agent, or authorized dealer shall provide or make provisions for the free use of a vehicle to any consumer whose vehicle is out of service beyond thirty (30) days by reason of delayed repair as a direct result of war, invasion, strike, fire, flood, or natural disaster.

(c) The burden is on the manufacturer to show that the reason for an extension under subsection (b) of this section was the direct cause for the failure of the manufacturer, its agent, or authorized dealer to cure any nonconformity during the time of the event.

**History.** Acts 1993, No. 285, § 12; 1993, No. 297, § 12.

#### **4-90-411. Diagnosis or repair — Documentation.**

(a) A manufacturer, its agent, or authorized dealer may not refuse to diagnose or repair any vehicle for the purpose of avoiding liability under this subchapter.

(b)(1)(A) A manufacturer, its agent, or authorized dealer shall provide a consumer with a written repair order each time the consumer's vehicle is brought in for examination or repair.

(B) The written repair order shall include a reference to each defect, nonconformity, or other complaint brought to the attention of the manufacturer, its agent, or authorized dealer by the consumer, and each presentation of the vehicle by the consumer for a reasonable opportunity to repair shall be a repair attempt for those defects, nonconformities, or other complaints noted in the written repair order.

(C)(i) However, in the case of a motor vehicle that is a motor home where two (2) or more manufacturers contributed to the construction of the motor home, it shall not count as a repair attempt if the repair facility at which the consumer presented the vehicle is not authorized by the manufacturer to provide warranty service on that vehicle.

(ii) In addition, it shall count as only one (1) repair attempt for a motor vehicle that is a motor home if the same nonconformity is being addressed a second time due to the consumer's decision to continue traveling and to seek the repair of that same nonconformity at another repair facility, rather than wait for the repair to be completed at the initial repair facility.

(2) The repair order must indicate all work performed on the vehicle, including examination of the vehicle, parts, and labor.

**History.** Acts 1993, No. 285, § 13; 1993, No. 297, § 13; 2001, No. 1134, § 5.

#### **4-90-412. Resale of returned nonconforming vehicle.**

(a) If a motor vehicle has been replaced or repurchased by a manufacturer as the result of a court judgment, an arbitration award, or any voluntary agreement entered into between a manufacturer or a manufacturer through its authorized dealer and a consumer that occurs after a consumer has notified the manufacturer of the consumer's desire to utilize the informal dispute settlement proceeding pursuant to this subchapter or a similar law of another state, the motor vehicle may not be resold in Arkansas unless:

(1) The manufacturer provides the same express warranty the manufacturer provided to the original purchaser, except that the term of the warranty need only last for twelve thousand (12,000) miles or twelve (12) months after the date of resale, whichever occurs first; and

(2) The manufacturer provides a written disclosure, signed by the consumer, indicating that the vehicle was returned to the manufacturer because of a nonconformity not cured within a reasonable time as provided by Arkansas law.

(b) The written disclosure required by this section applies to the first resale to a retail customer of the vehicle in Arkansas by the manufacturer or its authorized dealer.

**History.** Acts 1993, No. 285, § 14; 1993, No. 297, § 14; 2001, No. 1134, § 6.

#### **4-90-413. Affirmative defenses.**

It is an affirmative defense to any claim under this subchapter that:

(1) The nonconformity, defect, or condition does not substantially impair the use, value, or safety of the motor vehicle;

(2) The nonconformity, defect, or condition is the result of an accident, abuse, neglect, or unauthorized modification or alteration of the motor vehicle by persons other than the manufacturer, its agent, or authorized dealer;

(3) The claim by the consumer was not filed in good faith; or

(4) Any other defense allowed by law that may be raised against the claim.

**History.** Acts 1993, No. 285, § 15; 1993, No. 297, § 15.

#### **CASE NOTES**

##### **Common-Law Defenses.**

The law-of-the-case defense is an affirmative defense like estoppel or res judi-

cata. *State v. Bell*, 329 Ark. 422, 948 S.W.2d 557 (1997).

#### **4-90-414. Informal proceeding as precedent.**

(a)(1) Any manufacturer doing business in this state, entering into franchise agreements for the sale of its motor vehicles in this state, or offering express warranties on its motor vehicles sold or distributed for sale in this state, shall operate or participate in an informal dispute settlement proceeding located in the State of Arkansas which complies with the requirements of this section.

(2) The provisions of § 4-90-406(b)(1) and (2) concerning refunds or replacement do not apply to a consumer who has not first used this informal proceeding before commencing a civil action, unless the manufacturer allows a consumer to commence an action without first using this informal proceeding, or unless the manufacturer has failed to make the disclosure required by § 4-90-404(b).

(3)(A) The consumer shall receive adequate written notice from the manufacturer of the existence of the proceeding.

(B) Adequate written notice may include the incorporation of the informal dispute settlement proceeding into the terms of the written warranty to which the motor vehicle does not conform.

(b) The informal dispute proceeding shall meet the following criteria:

(1) The informal dispute proceeding must comply with the minimum requirements of the Federal Trade Commission for informal dispute settlement proceedings as set forth in 16 C.F.R. § 703.1 et seq., as in effect on the date of adoption of this subchapter, unless any provision of 16 C.F.R. § 703.1 et seq. is in conflict with this subchapter, in which case the provisions of this subchapter shall govern;

(2) The informal dispute proceedings must prescribe a reasonable time, not to exceed thirty (30) days after the decision is accepted by the buyer, within which the manufacturer or its agent must fulfill the terms of its decisions;

(3)(A) No documents shall be received by any informal dispute proceeding unless those documents have been provided to each of the parties in the dispute at or prior to the proceeding, with an opportunity for the parties to comment on the documents either in writing or orally.

(B) If a consumer is present during the informal dispute proceeding, the consumer may request postponement of the proceeding meeting to allow sufficient time to review any documents presented at the time of the meeting, which had not been presented to the consumer prior to the time of the meeting;

(4)(A) The informal dispute proceeding shall allow each party to appear and make an oral presentation within the State of Arkansas, unless the consumer agrees to submit the dispute for decision on the basis of documents alone or by telephone, or unless the party fails to appear for an oral presentation after reasonable prior written notice.

(B) If the consumer agrees to submit the dispute for decision on the basis of documents alone, then the manufacturer or dealer representatives may not participate in the discussion of the dispute;

(5) Consumers shall be given an adequate opportunity to contest a manufacturer's assertion that a nonconformity falls within intended specifications for the vehicle by having the basis of the manufacturer's claim appraised by a technical expert selected and paid for by the consumer prior to the informal dispute settlement hearing;

(6) A consumer may not be charged with a fee to participate in an informal dispute proceeding; and

(7) Any party to the dispute has the right to be represented by an attorney in an informal dispute proceeding.

(c)(1) The informal dispute proceeding shall annually submit a pool of not fewer than six (6) members to the Consumer Protection Division of the Office of the Attorney General.

(2) Selected strictly by rotation, one (1) member shall hear disputes scheduled for a particular session unless the consumer requests a panel

of three (3) members, in which case three (3) members, also selected by rotation, shall hear disputes scheduled for a particular three-member session.

(3) If the informal dispute proceeding deems it appropriate to require the services of an independent investigator, the investigator shall be selected from a pool of not fewer than four (4) members who are submitted annually to the division and from which the particular investigator shall be selected strictly by rotation.

**History.** Acts 1993, No. 285, § 16; 1993, No. 297, § 16; 2001, No. 1134, § 7.

**Publisher's Notes.** In reference to the term "the date of adoption of this subchap-

ter," Acts 1993, Nos. 285 and 297 were approved on March 1, 1993, and both became effective August 13, 1993.

#### **4-90-415. Enforcement — Exclusivity — Costs and expenses.**

(a) A consumer may bring a civil action to enforce this subchapter in a court of competent jurisdiction.

(b) This subchapter does not limit the rights and remedies that are otherwise available to a consumer under any applicable provisions of law.

(c) A consumer who prevails in any legal proceeding under this subchapter is entitled to recover as part of the judgment a sum equal to the aggregate amount of costs and expenses, including attorney's fees based upon actual time expended by the attorney, determined by the court to have been reasonably incurred by the consumer for or in connection with the commencement and prosecution of the action.

**History.** Acts 1993, No. 285, §§ 17-19; 1993, No. 297, §§ 17-19.

#### **CASE NOTES**

##### **Recovery of Expenses.**

In a customer's action against a truck manufacturer under the Arkansas New Motor Vehicle Quality Assurance Act, the trial court did not err in interpreting subsection (c) of this section to allow for the recovery of copy costs and mileage ex-

penses; even if it was assumed that costs were limited to those items set forth in Ark. R. Civ. P. 54(d), subsection (c) also allowed a consumer who prevailed to recover "expenses," including attorney fees. *DaimlerChrysler Corp. v. Smelser*, 375 Ark. 216, 289 S.W.3d 466 (2008).

#### **4-90-416. Time limitation for commencement of action.**

(a) An action brought under this subchapter must be commenced within two (2) years following the date the buyer first reports the nonconformity to the manufacturer, its agent, or authorized dealer.

(b) When the buyer has commenced an informal dispute settlement procedure described in § 4-90-414, the two-year period specified in subsection (a) of this section begins to run at the time the informal dispute settlement procedure is being commenced.

**History.** Acts 1993, No. 285, § 20; 1993, No. 297, § 20.

#### **4-90-417. Deceptive trade practices.**

A violation of any of the provisions of this subchapter shall be deemed a deceptive trade practice under § 4-88-101 et seq.

**History.** Acts 1993, No. 285, § 21; 1993, No. 297, § 21.

### **SUBCHAPTER 5 — MOTOR VEHICLE SERVICE CONTRACT ACT**

#### **SECTION.**

4-90-501. Title.

4-90-502. Definitions.

4-90-503. Applicability.

4-90-504. Exclusive governance of provisions.

4-90-505. Mandatory insurance.

4-90-506. Required service contract disclosures.

#### **SECTION.**

4-90-507. Termination and refunds.

4-90-508. Incidental benefits.

4-90-509. Rulemaking power.

4-90-510. Investigations and enforcement.

4-90-511. Unfair trade practices.

4-90-512. Form of service contracts.

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**Effective Dates.** Acts 1993, No. 805, § 18; Apr. 1, 1993. Emergency clause provided: "It is hereby found and determined by the General Assembly that the common law and statutory law of this state does not adequately address the matter of the issuance and regulation of motor vehicle service contracts; it is further found that legislation is necessary to allow for the marketing of such contracts in a manner

that is consistent with protection of the public which purchases such contracts and that such legislation should go into effect immediately. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

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#### **4-90-501. Title.**

This subchapter is known and may be cited as the "Motor Vehicle Service Contract Act".

**History.** Acts 1993, No. 805, § 1.

#### **4-90-502. Definitions.**

For purposes of this subchapter:

(1) "Commissioner" shall mean the Insurance Commissioner for the State of Arkansas;

(2) "Mechanical breakdown insurance" shall mean a policy, contract, or agreement that undertakes to perform or provide repair or replacement service, or indemnification for such service, for the operational or structural failure of a motor vehicle due to a defect in materials or

workmanship or normal wear and tear and that is issued by an insurer that is authorized or approved to transact the business of insurance in this state;

(3) "Motor vehicle" shall mean any vehicle designed for highway use and subject to registration under § 27-14-701 et seq.;

(4) "Motor vehicle service contract" or "service contract" shall mean a contract or agreement given for separate and identifiable consideration pursuant to which a service contract provider undertakes to perform or provide repair or replacement service, or indemnification for such service, for the operational or structural failure of a motor vehicle due to a defect in materials or workmanship or normal wear and tear, but does not include mechanical breakdown insurance;

(5) "Motor vehicle service contract provider" or "provider" shall mean a person who, as the principal or obligor, issues, makes, sells, or offers to sell a service contract;

(6) "Motor vehicle service contract reimbursement insurance policy" shall mean a policy of insurance providing coverage for all obligations and liabilities incurred by a motor vehicle service contract provider under the terms of the motor vehicle service contracts issued or sold by the provider; and

(7) "Service contract holder" or "holder" shall mean the person who purchases a service contract or a permitted transferee.

**History.** Acts 1993, No. 805, § 2.

#### **4-90-503. Applicability.**

This subchapter shall apply to motor vehicle service contracts sold on or after May 1, 1993.

**History.** Acts 1993, No. 805, § 17.

#### **4-90-504. Exclusive governance of provisions.**

(a) Except as provided in this subchapter, motor vehicle service contract providers shall be governed by the provisions of this subchapter and shall be exempt from all other provisions of the Arkansas Insurance Code.

(b) Nothing in this subchapter shall, however, prohibit or affect the giving, free of charge, of the usual warranties or performance guarantees by manufacturers, distributors, or dealers in connection with the sale of new motor vehicles; further, the requirements of this subchapter shall not apply to motor vehicle service contracts issued by a motor vehicle manufacturer, distributor, importer, or dealer of motor vehicles, nor shall the requirements of this subchapter apply to any nonrenewable motor vehicle service contract issued for a period of less than six (6) months, provided that the issuer of such motor vehicle service contract is the entity which sold the motor vehicle to which the service contract applies or is an affiliate of such entity.

(c) For purposes of this subchapter, an “affiliate” is an entity whose ownership is held fifty-one percent (51%) or more by the same entity which holds fifty-one percent (51%) or more ownership of the seller of the motor vehicle.

**History.** Acts 1993, No. 805, § 3.

**Publisher's Notes.** The Arkansas Insurance Code, derived from Acts 1959, No. 148, is codified as § 23-60-101 — 23-60-108, 23-60-110, 23-61-101 — 23-61-112, 23-61-201 — 23-61-206, 23-61-301 — 23-61-307, 23-61-401, 23-61-402, 23-62-101 — 23-62-108, 23-62-201, 23-62-202, 23-62-203 [repealed], 23-62-204, 23-62-205, 23-63-101 — 23-63-104, 23-63-201 — 23-63-216, 23-63-301, 23-63-302, 23-63-401 — 23-63-403, 23-63-404 [repealed], 23-63-601 — 23-63-613, 23-63-701, 23-63-801 — 23-63-833, 23-63-835 — 23-63-837, 23-63-838 [repealed], 23-63-901 — 23-63-912, 23-63-1001 — 23-63-1004, 23-64-101 — 23-64-103, 23-64-202 — 23-64-229, 23-65-101 — 23-65-104, 23-65-201 — 23-65-205, 23-65-301 — 23-65-319, 23-66-201 — 23-66-214, 23-66-301 — 23-66-306, 23-66-308 —

23-66-311, 23-66-313, 23-66-314, 23-68-101 — 23-68-113, 23-68-115 — 23-68-132, 23-69-101 — 23-69-103, 23-69-105 — 23-69-141, 23-69-143, 23-69-149 — 23-69-156, 23-70-101 — 23-70-124, 23-71-101 — 23-71-116, 23-72-101 — 23-72-122, 23-73-101 — 23-73-116, 23-74-101 — 23-74-141 [revised], 23-75-101 — 23-75-120, 23-79-101 — 23-79-106, former 23-79-107, 23-79-109 — 23-79-128, 23-79-131 — 23-79-134, 23-79-202 — 23-79-210, 23-81-101 — 23-81-117, 23-81-120 — 23-81-136, 23-81-201 — 23-81-213, 23-82-101 — 23-82-118, 23-84-101 — 23-84-111, 23-85-101 — 23-85-131, 23-86-101 — 23-86-104, 23-86-106 — 23-86-109, 23-86-112, 23-87-101 — 23-87-119, 23-88-101, 23-89-101, 23-89-102, 26-57-601 — 26-57-605, 26-57-607, 26-57-608, 26-57-610.

#### 4-90-505. Mandatory insurance.

(a) No motor vehicle service contract shall be issued, sold, or offered for sale in this state unless the motor vehicle service contract provider is insured under a motor vehicle service contract reimbursement insurance policy issued by an insurer authorized to do business in this state, and providing that the insurer will pay on behalf of the provider all sums which the provider is legally obligated to pay and will guarantee the performance of the provider's obligations undertaken according to the provider's contractual obligations under the service contracts issued or sold by the provider.

(b) No policy of insurance may be cancelled, terminated, or nonrenewed by the insurer unless a sixty-day written notice has been given to the motor vehicle service contract provider before the date of the cancellation, termination, or nonrenewal.

(c) No cancellation, termination, or nonrenewal shall affect the liability of the insurer to guarantee the provider's performance under the motor vehicle service contracts issued or sold prior to the effective date of cancellation or termination or nonrenewal.

(d) The insured motor vehicle service contract must conspicuously state:

(1) That the obligations of the provider to the service contract holder are guaranteed under a motor vehicle service contract reimbursement insurance policy;

(2) The name, address, and telephone number of the issuer of the provider's motor vehicle service contract reimbursement insurance policy; and

(3) The procedure for filing a claim under the service contract directly with the motor vehicle service contract reimbursement insurer.

(e) The motor vehicle service contract reimbursement insurer shall establish and maintain unearned premium reserves and claims reserves for the gross policy obligations under the motor vehicle service contract reimbursement insurance policy, net of reinsurance ceded, for which the insurer is entitled to full reserve credit on its financial statements, in accordance with the provisions of this subchapter.

**History.** Acts 1993, No. 805, § 4.

#### **4-90-506. Required service contract disclosures.**

All motor vehicle service contracts issued or sold for delivery in this state shall contain the following disclosures in a conspicuous and readable manner:

- (1) The name and address of the provider and the holder;
- (2) The total retail price of the service contract;
- (3) The procedure for making a claim under the service contract, including the name, address, and telephone number of any person from whom approval is required before covered repairs may be commenced;
- (4) The existence and amount of a deductible, if any;
- (5) The motor vehicle parts and components covered under the service contract, and any limitations, exceptions, or exclusions;
- (6) The terms, conditions, and restrictions governing transferability of the service contract, if any;
- (7) The provisions governing termination and refunds in accordance with § 4-90-507; and
- (8) A statement that purchase of the motor vehicle service contract is not required in order to purchase or obtain financing for a motor vehicle.

**History.** Acts 1993, No. 805, § 5.

#### **4-90-507. Termination and refunds.**

No motor vehicle service contract may be issued, sold, or offered for sale or delivery in this state unless the service contract conspicuously states that the holder is allowed to cancel the service contract:

- (1) Within thirty (30) days of its purchase, if no claim has been made, and receive a full refund of the service contract retail price, less any cancellation fee stated in the service contract not exceeding fifty dollars (\$50.00); or
- (2) At any other time, and receive a pro rata refund of the service contract retail price for the unexpired term of the service contract based on the number of elapsed months or miles, less any cancellation fee stated in the service contract not exceeding fifty dollars (\$50.00).

**History.** Acts 1993, No. 805, § 6.

**4-90-508. Incidental benefits.**

A motor vehicle service contract may provide reimbursement for towing and rental vehicle expenses incurred by the service contract holder as a direct and proximate result of an operational or structural failure covered by the service contract, emergency road service, and such other incidental benefits as may be approved by the Insurance Commissioner.

**History.** Acts 1993, No. 805, § 7.

**4-90-509. Rulemaking power.**

(a) The Insurance Commissioner may adopt such administrative rules and regulations as are necessary to implement the provisions of this subchapter.

(b) The commissioner may promulgate rules and regulations providing for the filing with the commissioner of motor vehicle service contract forms by providers authorized under § 4-90-504; provided, that any such rules and regulations may not require the approval of such forms by the commissioner prior to their initial use.

**History.** Acts 1993, No. 805, §§ 8, 12.

**4-90-510. Investigations and enforcement.**

(a) The Insurance Commissioner is authorized to conduct such investigations of the motor vehicle service contract business, of any provider, and of any person assisting the provider in the conduct of such business as the commissioner may deem necessary.

(b) The commissioner shall have and may exercise all of the powers conferred by §§ 23-61-103, 23-61-108 — 23-61-110, 23-61-201(a)(1), 23-61-203 — 23-61-206, and 23-61-301 et seq. in the conduct of such investigations and in the enforcement of this subchapter and any rules and regulations promulgated by the commissioner.

**History.** Acts 1993, No. 805, § 9.

**4-90-511. Unfair trade practices.**

Motor vehicle service contract providers shall be subject to the provisions of the Trade Practices Act, § 23-66-201 et seq., to the extent such act may be appropriately applied to motor vehicle service contract providers given the nature of such contracts.

**History.** Acts 1993, No. 805, § 10.

**4-90-512. Form of service contracts.**

No motor vehicle service contract may be issued which:

(1) Is in any respect in violation of or does not comply with this subchapter, any specifically applicable provision of the Arkansas Insurance Code, or any applicable rule of the department;

(2) Contains, or incorporates by reference when such incorporation is otherwise permissible, any inconsistent, ambiguous, illusory, or misleading clauses, or exceptions and conditions which deceptively affect the risk purported to be assumed in the general coverage of the service agreement;

(3) Has any title, heading, or other indication of its provisions which is misleading;

(4) Is printed or otherwise reproduced in such manner as to render any material provision of the form substantially illegible;

(5) Contains any provision which is unconscionable or which encourages misrepresentation;

(6) Contains any provision which makes it difficult to determine the actual provider issuing the form; or

(7) Contains any provision for reducing claim payments due to depreciation of parts.

**History.** Acts 1993, No. 805, § 11.

**Publisher's Notes.** The Arkansas Insurance Code, derived from Acts 1959, No. 148, is codified as § 23-60-101 — 23-60-108, 23-60-110, 23-61-101 — 23-61-112, 23-61-201 — 23-61-206, 23-61-301 — 23-61-307, 23-61-401, 23-61-402, 23-62-101 — 23-62-108, 23-62-201, 23-62-202, 23-62-203 [repealed], 23-62-204, 23-62-205, 23-63-101 — 23-63-104, 23-63-201 — 23-63-216, 23-63-301, 23-63-302, 23-63-401 — 23-63-404 [repealed], 23-63-601 — 23-63-613, 23-63-701, 23-63-801 — 23-63-833, 23-63-835 — 23-63-837, 26-63-838 [repealed], 23-63-901 — 23-63-912, 23-63-1001 — 23-63-1004, 23-64-101 — 23-64-103, 23-64-202 — 23-64-229, 23-65-101 — 23-65-104, 23-65-201 — 23-65-205, 23-65-301 — 23-65-319, 23-66-201 — 23-66-214, 23-66-301 — 23-66-306, 23-66-308 — 23-

66-311, 23-66-313, 23-66-314, 23-68-101 — 23-68-113, 23-68-115 — 23-68-132, 23-69-101 — 23-69-103, 23-69-105 — 23-69-141, 23-69-143, 23-69-149 — 23-69-156, 23-70-101 — 23-70-124, 23-71-101 — 23-71-116, 23-72-101 — 23-72-122, 23-73-101 — 23-73-116, 23-74-101 — 23-74-141 [revised], 23-75-101 — 23-75-120, 23-79-101 — 23-79-106, former 23-79-107, 23-79-109 — 23-79-128, 23-79-131 — 23-79-134, 23-79-202 — 23-79-210, 23-81-101 — 23-81-117, 23-81-120 — 23-81-136, 23-81-201 — 23-81-213, 23-82-101 — 23-82-118, 23-84-101 — 23-84-111, 23-85-101 — 23-85-131, 23-86-101 — 23-86-104, 23-86-106 — 23-86-109, 23-86-112, 23-87-101 — 23-87-119, 23-88-101, 23-89-101, 23-89-102, 26-57-601 — 26-57-605, 26-57-607, 26-57-608, 26-57-610.

## SUBCHAPTER 6 — CONSUMER MOTOR VEHICLE LEASING ACT

### SECTION.

4-90-601 — 4-90-607. [Repealed.]

### 4-90-601 — 4-90-607. [Repealed.]

**A.C.R.C. Notes.** Acts 2001, No. 953, § 1, provided: "The provisions of the Consumer Motor Vehicle Leasing Act enacted in Arkansas in 1999 deviates substantially from federal law which governs motor vehicle leasing in most states in the United States. After the enactment of the

Consumer Motor Vehicle Leasing Act, many motor vehicle leasing companies withdrew from doing business in the State of Arkansas because of the difficulty of administering the various provisions of Arkansas law as compared to other states in the country. The General Assembly

finds that it will be beneficial to the motor vehicle leasing industry and its customers in Arkansas if Arkansas laws are brought into conformity with the motor vehicle consumer leasing laws in almost every other state as governed by federal law pursuant to the Consumer Leasing Act, 15 U.S.C § 1667 - 1667e and its implementing provisions, Regulation M, 12 C.F.R. § 213, et seq.”

**Publisher's Notes.** This subchapter

was repealed by Acts 2001, No. 953, § 2. The subchapter was derived from the following sources:

- 4-90-601. Acts 1999, No. 1059, § 9.
- 4-90-602. Acts 1999, No. 1059, § 1.
- 4-90-603. Acts 1999, No. 1059, § 2.
- 4-90-604. Acts 1999, No. 1059, § 3.
- 4-90-605. Acts 1999, No. 1059, § 4.
- 4-90-606. Acts 1999, No. 1059, § 5.
- 4-90-607. Acts 1999, No. 1059, § 6.

## SUBCHAPTER 7 — DEBT CANCELLATION AGREEMENTS

### SECTION.

4-90-701. Definition.

4-90-702. Requiring borrower to purchase debt cancellation agreement prohibited.

4-90-703. Debt cancellation agreements to be legible — Disclosure requirements.

### SECTION.

4-90-704. Debt cancellation agreements — Restrictions.

4-90-705. Application of § 4-88-101 et seq. to debt cancellation agreements and sellers of debt cancellation agreements.

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**Effective Dates.** Acts 2007, No. 496, § 24: Mar. 26, 2007. Emergency clause provided: “It is found and determined by the General Assembly of the State of Arkansas that the incompatibility of acts of the Eighty-Sixth General Assembly presents difficult compliance issues for the administration of debt cancellation agreements; that in order to avoid a disruption in commerce associated with compliance with other debt cancellation legislation, the enactment of Sections 22 and 23 of this act is immediately necessary. There-

fore, an emergency is declared to exist and Sections 22 and 23 of this act being immediately necessary for the preservation of the public peace, health, and safety, Sections 22 and 23 shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto.”

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### 4-90-701. Definition.

As used in this subchapter, “debt cancellation agreement” means a loan term or contractual arrangement modifying a loan term dealing with motor vehicles under which a lender agrees to cancel all or part of a borrower’s obligation to repay an extension of credit from the lender upon the occurrence of a specified event other than the death or disability of the borrower, whether or not separate from or a part of other loan documents. Provided, however, for purposes of this subchapter only, the term “debt cancellation agreement” shall not include that form of debt cancellation agreement which constitutes a guaranteed automobile protection waiver agreement or “GAP” waiver agreement. A guaranteed automobile protection waiver agreement or “GAP” waiver

agreement means a loan term or a contractual arrangement modifying a loan term dealing with motor vehicles under which a lender agrees to waive, cancel, pay, or satisfy any remaining balance owed on a loan after a total loss or theft of the vehicle.

**History.** Acts 2007, No. 496, § 22.

#### **4-90-702. Requiring borrower to purchase debt cancellation agreement prohibited.**

A lender shall not require a borrower to purchase a debt cancellation agreement.

**History.** Acts 2007, No. 496, § 22.

#### **4-90-703. Debt cancellation agreements to be legible — Disclosure requirements.**

All terms of a debt cancellation agreement shall be printed or reproduced to render all material provisions of the agreement legible and shall clearly and conspicuously disclose the following information:

(1) If the debt cancellation agreement is provided by or administered by a third party, the debt cancellation agreement shall disclose that fact and provide the name, address, and telephone number of the third party and describe the procedure to follow for filing a claim with that third party under the debt cancellation agreement;

(2) The total retail price of the debt cancellation agreement;

(3) Any limitation or restriction on the cancellation of the entire debt due upon the occurrence of the specified event;

(4) That the purchaser is allowed to cancel the debt cancellation agreement at any time and receive a refund paid directly to the purchaser minus any cancellation fee not to exceed twenty-five dollars (\$25.00) as follows:

(A) If the debt cancellation agreement is cancelled within thirty (30) days of purchase, a purchaser shall receive a full refund of the retail price; or

(B) If the debt cancellation agreement is cancelled at a later time, the purchaser shall receive a pro rata refund of the retail price for the unexpired term based upon the number of elapsed months at the time of the cancellation compared to the total length of the financing agreement; and

(5) That the terms of the debt cancellation agreement financed by the lender are binding on the lender.

**History.** Acts 2007, No. 496, § 22.

#### **4-90-704. Debt cancellation agreements — Restrictions.**

No debt cancellation agreement shall be issued that:

(1) Is in any respect in violation of or does not comply with this subchapter;

(2) Contains or incorporates by reference if incorporation by reference is otherwise permissible any inconsistent, ambiguous, illusory, or misleading clauses or exceptions and conditions that deceptively affect the material terms of the debt cancellation agreement;

(3) Has a title, heading, or other indication of its provisions that is misleading; or

(4) Is sold after any representation, oral or written, that is misleading or deceptive with respect to any material term of the contract or any provision of this subchapter.

**History.** Acts 2007, No. 496, § 22.

#### **4-90-705. Application of § 4-88-101 et seq. to debt cancellation agreements and sellers of debt cancellation agreements.**

(a) Debt cancellation agreements and sellers of debt cancellation agreements are subject to the provisions of § 4-88-101 et seq., and any violation of any of the provisions of this subchapter constitutes an unconscionable or deceptive act or practice under § 4-88-101 et seq.

(b) All remedies, penalties, and authority granted to the Attorney General under § 4-88-101 et seq. are available to the Attorney General for the enforcement of this subchapter.

**History.** Acts 2007, No. 496, § 22.

## **CHAPTER 91**

### **CREDIT SERVICES ORGANIZATIONS**

#### **SECTION.**

4-91-101. Title.

4-91-102. Definitions.

4-91-103. Waiver of rights.

4-91-104. Violations.

4-91-105. Damages.

4-91-106. Prohibited acts.

#### **SECTION.**

4-91-107. Information statement — Requirements.

4-91-108. Information statement — Contents.

4-91-109. Contract requirements — Notice of cancellation.

#### **4-91-101. Title.**

This chapter may be known and cited as the “Credit Services Organizations Act of 1987”.

**History.** Acts 1987, No. 321, § 1.

#### **4-91-102. Definitions.**

As used in this chapter, unless the context otherwise requires:

(1) “Buyer” means any individual who is solicited to purchase or who purchases the services of a credit services organization;

(2)(A) "Credit services organization" means any person or entity that, with respect to the extension of credit by others, sells, provides, performs, or represents that the person or entity will sell, provide, or perform, in return for the payment of money or other valuable consideration, any of the following services:

- (i) Improve a buyer's credit record, history, or rating;
- (ii) Obtain an extension of credit for a buyer; or
- (iii) Provide advice or assistance to a buyer with regard to either subdivisions (2)(A)(i) or (ii) of this section.

(B) "Credit services organization" does not include:

(i) Any person or entity authorized to make loans or extensions of credit under the laws of this state or the United States, which person or entity is subject to regulation and supervision by this state or the United States or a lender approved by the United States Secretary of Housing and Urban Development for participation in any mortgage insurance program under the National Housing Act;

(ii) Any bank, savings bank, or savings and loan institution whose deposits or accounts are eligible for insurance by the Federal Deposit Insurance Corporation or the Federal Savings and Loan Insurance Corporation, or a subsidiary of such bank, savings bank, or savings and loan institution;

(iii) Any credit union, federal credit union, or out-of-state credit union doing business in this state;

(iv) Any nonprofit organization exempt from taxation under § 501(c)(3) of the Internal Revenue Code;

(v) Any person licensed as a real estate broker by this state if the person is acting within the course and scope of that license;

(vi) Any person licensed as a collection agency under the laws of this state if the person is acting within the course and scope of that license;

(vii) Any person licensed to practice law in this state if the person renders services within the course and scope of his or her practice as an attorney;

(viii) Any broker-dealer registered with the Securities and Exchange Commission or the Commodity Futures Trading Commission if the broker-dealer is acting within the course and scope of that regulation; or

(ix) Any consumer reporting agency as defined in the federal Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681t; and

(3) "Extension of credit" means the right, offered or granted primarily for personal, family, or household purposes, to defer payment of debt or to incur debt and defer its payment.

**History.** Acts 1987, No. 321, § 2.

**U.S. Code.** Internal Revenue Code § 501(c)(3), referred to in this section, is codified as 26 U.S.C. § 501(c)(3).

The National Housing Act, referred to in this section, is codified as 12 U.S.C. § 1702 et seq.

**4-91-103. Waiver of rights.**

(a) Any waiver by a buyer of any part of this chapter is void. Any attempt by a credit services organization to have a buyer waive rights given by this chapter is a violation of this chapter.

(b) In any proceeding involving this chapter, the burden of proving an exemption or an exception from a definition is upon the person claiming it.

**History.** Acts 1987, No. 321, § 8.

**4-91-104. Violations.**

(a) Any person who violates this chapter is guilty of a Class A misdemeanor. Any court of competent jurisdiction in this state may restrain and enjoin any violation of this chapter.

(b) This section and § 4-91-103 shall not limit or restrict the right of any person to pursue any appropriate remedy at law for a violation of this chapter.

**History.** Acts 1987, No. 321, § 8; 1991, No. 786, § 1.

**Publisher's Notes.** Acts 1991, No. 786, § 37, provided, "The enactment and adoption of this Act shall not repeal, expressly or impliedly, the acts passed at the regular session of the 78th General Assembly. All

such acts shall have full effect and, so far as those acts intentionally vary from or conflict with any provision contained in this Act, those acts shall have the effect of subsequent acts and as amending or repealing the appropriate parts of the Arkansas Code of 1987."

**4-91-105. Damages.**

(a) Any buyer suffering damages as a result of a violation of this chapter by any credit services organization may bring any action for recovery of damages. Judgment shall be entered for actual damages, but in no case shall the amount be less than the amount paid by the buyer to the credit services organization, plus reasonable attorney's fees and costs. An award may also be entered for punitive damages.

(b) The remedies provided under this chapter are in addition to any other procedures or remedies for any violation or conduct otherwise provided by law.

**History.** Acts 1987, No. 321, § 9.

**4-91-106. Prohibited acts.**

(a) A credit services organization, its salespersons, agents, and representatives, and independent contractors who sell or attempt to sell the services of a credit services organization may not do any of the following:

(1) Charge or receive any money or other valuable consideration prior to full and complete performance of the services the credit services organization has agreed to perform for the buyer unless the credit services organization has obtained a surety bond of ten thousand

dollars (\$10,000) issued by a surety company admitted to do business in this state and has established a trust account at a federally insured bank or savings and loan association located in this state;

(2) Charge or receive any money or other valuable consideration solely for referral of the buyer to a retail seller who will or may extend credit to the buyer if the credit that is or will be extended to the buyer is upon substantially the same terms as those available to the general public;

(3) Make, counsel, or advise any buyer to make, any statement with respect to a buyer's credit worthiness, credit standing, or credit capacity that is untrue or misleading or that should be known by the exercise of reasonable care to be untrue or misleading to a credit reporting agency or to any person who has extended credit to a buyer or to whom a buyer is applying for an extension of credit; or

(4) Make or use any untrue or misleading representations in the offer or sale of the services of a credit services organization or engage, directly or indirectly, in any act, practice, or course of business that operates or would operate as fraud or deception upon any person in connection with the offer or sale of the services of a credit services organization.

(b) If a credit services organization is in compliance with subdivision (a)(1) of this section, the salesperson, agent, or representative who sells the services of that organization is not required to obtain a surety bond and establish a trust account.

**History.** Acts 1987, No. 321, §§ 3, 4.

#### **4-91-107. Information statement — Requirements.**

(a) Before the execution of a contract or agreement between the buyer and a credit services organization or before the receipt by the credit services organization of any money or other valuable consideration, whichever occurs first, the credit services organization shall provide the buyer with a statement in writing containing all the information required by § 4-91-108.

(b) The credit services organization shall maintain on file for a period of two (2) years an exact copy of the statement, personally signed by the buyer, acknowledging receipt of a copy of the statement.

**History.** Acts 1987, No. 321, § 5.

#### **4-91-108. Information statement — Contents.**

The information statement required under § 4-91-107 shall include all of the following:

(1)(A) A complete and accurate statement of the buyer's right to review any file on the buyer maintained by any consumer reporting agency, as provided under the federal Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681t;

(B) A statement that the buyer may review his or her consumer reporting agency file at no charge if a request is made to the consumer reporting agency within thirty (30) days after receiving notice that credit has been denied; and

(C) The approximate price the buyer will be charged by the consumer reporting agency to review his or her consumer reporting agency file;

(2) A complete and accurate statement of the buyer's right to dispute the completeness or accuracy of any item contained in any file on the buyer maintained by any consumer reporting agency;

(3) A complete and detailed description of the services to be performed by the credit services organization for the buyer and the total amount the buyer will have to pay, or become obligated to pay, for the services;

(4) A statement asserting the buyer's right to proceed against the bond or trust account required under § 4-91-106(a); and

(5) The name and address of the surety company that issued the bond or the name and address of the depository and the trustee and the account number of the trust account.

**History.** Acts 1987, No. 321, § 6; 1991, No. 786, § 2. the regular session of the 78th General Assembly, see the publisher's note under § 4-91-104.

**Publisher's Notes.** As to the effect of Acts 1991, No. 786 on the acts passed at

#### **4-91-109. Contract requirements — Notice of cancellation.**

(a)(1) Each contract between the buyer and a credit services organization for the purchase of the services of the credit services organization shall be in writing, dated, and signed by the buyer and shall include all of the following:

(A) A conspicuous statement in boldface type, in immediate proximity to the space reserved for the signature of the buyer, as follows: "You, the buyer, may cancel this contract at any time prior to midnight of the fifth day after the date of the transaction. See the attached notice of cancellation form for an explanation of this right";

(B) The terms and conditions of payment, including the total of all payments to be made by the buyer, whether to the credit services organization or to some other person;

(C) A full and detailed description of the services to be performed by the credit services organization for the buyer, including all guarantees and all promises of full or partial refunds, and the estimated date by which the services are to be performed or the estimated length of time for performing the services; and

(D) The credit services organization's principal business address and the name and address of its agent in this state authorized to receive service of process.

(2) The contract shall be accompanied by a completed form in duplicate, captioned "Notice of Cancellation", that shall be attached to the contract, be easily detachable, and contain in boldface type the

following statement written in the same language as used in the contract:

“Notice of Cancellation

You may cancel this contract without any penalty or obligation within five (5) days from the date the contract is signed.

If you cancel this contract, any payment made by you under this contract will be returned within ten (10) days following receipt by the seller of your cancellation notice.

To cancel this contract, mail or deliver a signed dated copy of this cancellation notice, or any other written notice to

\_\_\_\_\_ (name of seller) at \_\_\_\_\_ (address of seller)  
\_\_\_\_\_ (place of business) not later than midnight \_\_\_\_\_ (date)

I hereby cancel this transaction,

\_\_\_\_\_ (date)  
\_\_\_\_\_ (purchaser’s signature) ”

(b) The credit services organization shall give to the buyer a copy of the completed contract and all other documents the credit services organization requires the buyer to sign at the time they are signed.

**History.** Acts 1987, No. 321, § 7.

CHAPTER 92

RENTAL PURCHASES

SECTION.

4-92-101. Title.

4-92-102. Definitions.

4-92-103. Liability of lessor.

4-92-104. Agreement — Nature.

SECTION.

4-92-105. Agreement — Provisions prohibited and required.

4-92-106. Agreement — Reinstatement.

4-92-107. Advertisements.

4-92-101. Title.

This chapter shall be known and may be cited as the “Rental Purchase Act”.

**History.** Acts 1987, No. 490, § 1.

4-92-102. Definitions.

As used in this chapter, unless the context otherwise requires:

(1) “Advertisement” means a commercial message in any medium that directly or indirectly promotes or assists a rental-purchase agreement, except for in-store merchandising aids;

(2) “Consumer” means a person who leases personal property under a rental-purchase agreement;

(3) “Merchandise” means the personal property that is the subject of a rental-purchase agreement;

(4) “Lessor” means a person who, in the ordinary course of business, regularly leases, offers to lease, or arranges for the leasing of merchan-

dise under a rental-purchase agreement and includes a person who is assigned an interest in a rental-purchase agreement;

(5) "Person" means an individual, corporation, partnership, organization, or any other entity;

(6) "Reinstatement period" means the period of time specified in § 4-92-106 during which a consumer may either pay delinquent rent or return merchandise and thereby retain the right to have the rental-purchase agreement reinstated; and

(7) "Rental-purchase agreement" means an agreement for the use of merchandise by a consumer for personal, family, household, or business purposes for an initial period of four (4) months or less that is automatically renewable with each payment after the initial period, but does not obligate or require the consumer to continue leasing or using the merchandise after the initial period, and that permits the consumer to become the owner of the merchandise, but does not obligate the consumer to purchase or become the owner of the merchandise.

**History.** Acts 1987, No. 490, § 2.

#### CASE NOTES

**Cited:** In re Taylor, 130 B.R. 849  
(Bankr. E.D. Ark. 1991).

#### 4-92-103. Liability of lessor.

(a) A consumer damaged by a violation of this chapter by a lessor is entitled to recover from the lessor:

(1) Actual damages;

(2) Twenty-five percent (25%) of an amount equal to the total amount of payments required to obtain ownership of the merchandise involved. However, the amount recovered under this subdivision (a)(2) may not be less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000); and

(3) Reasonable attorney's fees not to exceed fifteen percent (15%) of the consumer's allowable recovery and court costs.

(b)(1) Any execution or enforcement of a rental-purchase agreement in violation of this chapter or any other violation of this chapter shall constitute an unfair or deceptive act or practice as defined by the Deceptive Trade Practices Act, § 4-88-101 et seq.

(2) All remedies, penalties, and authority granted to the Attorney General under the Deceptive Trade Practices Act, § 4-88-101 et seq., shall be available to the Attorney General for the enforcement of this chapter.

**History.** Acts 1987, No. 490, § 8; 1993,  
No. 1050, § 1.

**4-92-104. Agreement — Nature.**

An agreement which conforms with the definition as set forth in § 4-92-102(7) shall be a true lease and shall not constitute a credit sale, retail installment contract, agreement, obligation, or any other type of credit sale financing device, nor shall it create a security interest as that term is defined in § 4-1-201(b)(35). Until the lessor transfers title to the merchandise to the consumer, the relationship of the parties to a rental-purchase agreement shall be that of a lessor and lessee and not that of a seller and buyer, and title to the merchandise shall remain vested with the lessor.

**History.** Acts 1987, No. 490, § 3.

**CASE NOTES****True Lease.**

The agreements between the debtor and its creditor complied, in every respect, with the provisions of § 4-92-105 and

therefore, the agreements were determined to be leases. In re Taylor, 130 B.R. 849 (Bankr. E.D. Ark. 1991).

**4-92-105. Agreement — Provisions prohibited and required.**

- (a) A rental-purchase agreement shall not contain a provision:
  - (1) Requiring a confession of judgment;
  - (2) Authorizing a merchant or agent of the merchant to commit a breach of the peace while repossessing merchandise;
  - (3) Waiving a defense, counterclaim, or right the consumer may have against the merchant or an agent of the merchant;
  - (4) Requiring the purchase of insurance from the merchant to cover the merchandise.\*
- (b) A rental-purchase agreement must disclose:
  - (1) Whether the merchandise is new or used;
  - (2) The amount and timing of regular rental payments;
  - (3) The total number of payments necessary and the total amount to be paid to acquire ownership;
  - (4) The amounts and purpose of any other payment, charge, or fee in addition to the regular periodic rental payment;
  - (5) That the consumer does not acquire any ownership rights until the consumer has complied with the ownership terms of the agreement;
  - (6) Whether the consumer is liable for loss or damage to the merchandise, and if so, the maximum amount for which the consumer may be held liable; and
  - (7) Notice of the right to reinstate an agreement as provided in § 4-92-106(a).

**History.** Acts 1987, No. 490, §§ 4, 5.

**CASE NOTES****Compliance.**

The agreements between the debtor and its creditor complied, in every respect, with the provisions of this section and

therefore, the agreements were determined to be leases. In re Taylor, 130 B.R. 849 (Bankr. E.D. Ark. 1991).

**4-92-106. Agreement — Reinstatement.**

(a) A consumer who fails to make a timely rental payment may reinstate an agreement without losing any rights or options previously acquired by either paying all rental and other charges due or returning the merchandise to the lessor within five (5) business days from the date of the last scheduled rental payment if the consumer pays rent monthly, or within two (2) business days from the date of the last scheduled rental payment if the consumer pays more frequently than monthly.

(b) Nothing in this section shall prevent the accrual of any late charges or reinstatement fees charged by the lessor.

(c) Nothing in this section shall prevent the lessor from attempting to repossess the merchandise during the reinstatement period, but the consumer's right to reinstate an agreement shall not expire because of the repossession.

(d) If the merchandise is returned during the applicable reinstatement period, other than through judicial process, the right to reinstate shall be extended for a period of not less than thirty (30) days after the date of the return of the merchandise.

(e) No consumer shall have the right to reinstate more than three (3) times during the term of any one (1) rental-purchase agreement.

(f) On reinstatement, the lessor shall provide the consumer with the same merchandise or shall substitute merchandise of comparable quality and condition. However, the lessor shall not be required to provide new disclosures upon reinstatement.

**History.** Acts 1987, No. 490, § 6.

**4-92-107. Advertisements.**

Any advertisement for a rental-purchase agreement must clearly and conspicuously state that the advertised transaction is a rental-purchase transaction.

**History.** Acts 1987, No. 490, § 7.

**CHAPTER 93****CREDIT REPORTING DISCLOSURES****SECTION.**

4-93-101. Title.

4-93-102. Definitions.

**SECTION.**

4-93-103. Notice of adverse action — Required.

## SECTION.

4-93-104. Notice of adverse action — Contents — Damages.

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**RESEARCH REFERENCES**

**Am. Jur.** 15A Am. Jur. 2d, Coll. & Cr. **C.J.S.** 21 C.J.S. Cr. Rep. Ag. § 1 et seq. A., § 1 et seq.

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**4-93-101. Title.**

This chapter may be known and cited as the “Credit Reporting Disclosure Act of 1989”.

**History.** Acts 1989, No. 431, § 1; 1989, No. 593, § 1.

**4-93-102. Definitions.**

As used in this chapter, the terms “consumer”, “consumer report”, “consumer reporting agency”, and “person” have the same meaning as used in the federal Fair Credit Reporting Act, 15 U.S.C. § 1681, 84 Stat. 1128.

**History.** Acts 1989, No. 431, § 2; 1989, No. 593, § 2.

**4-93-103. Notice of adverse action — Required.**

Whenever credit, the further extension of existing credit, or the increase in limits of existing credit for personal, family, or household purposes is denied either wholly or partly because of information contained in a consumer report from a consumer reporting agency, the user of the consumer report shall so advise the consumer against whom such adverse action has been taken.

**History.** Acts 1989, No. 431, § 3; 1989, No. 593, § 3.

**4-93-104. Notice of adverse action — Contents — Damages.**

(a) The notification of adverse action shall be in writing and shall contain:

- (1) A statement of the action taken;
- (2) The name and address of the creditor;
- (3) The name and address of the consumer reporting agency making the report; and
- (4) The social security number of the consumer, provided that the social security number has been given to the user of the consumer

report by the consumer or is contained in the consumer report received from the consumer reporting agency.

(b) Any person who fails to provide the notification required by this chapter shall be liable to the injured party for actual damages.

**History.** Acts 1989, No. 431, § 4; 1989, No. 593, §§ 4, 5.

## CHAPTER 94

### HEALTH SPA CONSUMER PROTECTION ACT

#### SECTION.

4-94-101. Title.

4-94-102. Definitions.

4-94-103. Scope of chapter.

4-94-104. Written contract required —  
Delivery to buyer.

4-94-105. Void or voidable provisions —  
Waiver.

#### SECTION.

4-94-106. Registration statement.

4-94-107. Payment period.

4-94-108. Time for performance.

4-94-109. Cancellation of contracts.

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#### RESEARCH REFERENCES

**ALR.** Exercise and related equipment. 76 A.L.R.4th 145.

Liability of proprietor of private gymnasium, reducing salon, or similar health club for injury to patron. 79 A.L.R.4th 127.

Hotel, motel, resort, or private member-

ship club or association operating swimming pool, liability for injury or death of guest or member. 55 A.L.R.5th 563.

**U. Ark. Little Rock L.J.** Survey, Contracts, 12 U. Ark. Little Rock L.J. 611.

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#### 4-94-101. Title.

This chapter shall be known and may be cited as the "Health Spa Consumer Protection Act".

**History.** Acts 1989, No. 264, § 1.

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#### RESEARCH REFERENCES

**ALR.** Construction and Applicability of Membership Contracts or Fees. 48 State Statutes Governing Health Club A.L.R.6th 223.

#### 4-94-102. Definitions.

As used in this chapter, unless the context otherwise requires:

(1) "Buyer" means a person who contracts for and purchases services under a health spa services contract;

(2) "Contract for health spa services" means a written agreement whereby a buyer purchases or is obligated to purchase the health spa services or a right to use its facilities;

(3)(A) “Health spa” means and includes any person, firm, corporation, organization, club, or association engaged in the sale of memberships in a program of physical exercise which includes the use of one (1) or more of a sauna, whirlpool, weightlifting room, massage, steam room, or exercising machine or device, or engaged in the sale of the right or privilege to use exercise equipment or facilities, such as a sauna, whirlpool, weightlifting room, massage, steam room, or exercising machine or device.

(B) The term “health spa” shall not include the following:

(i) Bona fide nonprofit organizations, including, but not limited to, the Young Men’s Christian Association, Young Women’s Christian Association, or similar organizations whose functions as health spas are only incidental to the overall functions and purposes;

(ii) Any organization primarily operated for the purpose of teaching a particular form of martial arts, such as judo or karate;

(iii) Any nonprofit public or private school, college, or university;

(iv) Any country club; or

(v) Weight-loss or weight-control services which do not provide physical exercise facilities and which do not obligate the customer for more than twenty-five (25) months; and

(4) “Seller” means the person, corporation, partnership, association, or group that is engaged in the operation of the health spa, as defined in this section and who offers for sale the right to use health spa facilities or services, now or in the future.

**History.** Acts 1989, No. 264, § 2.

#### **4-94-103. Scope of chapter.**

The provisions of this chapter are not exclusive and do not relieve the parties or the contracts subject thereto from compliance with all other applicable provisions of law.

**History.** Acts 1989, No. 264, § 6.

#### **4-94-104. Written contract required — Delivery to buyer.**

(a) Every contract for health spa services shall be in writing and be subject to the provisions of this chapter.

(b) A copy of the written contract shall be given to the buyer at the time the contract is executed.

**History.** Acts 1989, No. 264, § 3.

#### **RESEARCH REFERENCES**

**ALR.** Construction and Applicability of Membership Contracts or Fees. 48 State Statutes Governing Health Club A.L.R.6th 223.

**4-94-105. Void or voidable provisions — Waiver.**

(a) Any contract for health spa services which does not comply with the applicable provisions of this chapter shall be voidable at the option of the buyer.

(b)(1) Any contract for health spa services entered into in reliance upon any willful and false, fraudulent, or misleading information, representation, notice, or advertisement of the seller shall be void and unenforceable.

(2)(A) Any attempted enforcement of a health spa services contract in violation of this chapter shall constitute an unfair or deceptive act or practice as defined by the Deceptive Trade Practices Act, § 4-88-101 et seq.

(B) All remedies, penalties, and authority granted to the Attorney General under the Deceptive Trade Practices Act, § 4-88-101 et seq., shall be available to the Attorney General for the enforcement of this chapter.

(c) Any waiver of the buyer of the provisions of this chapter shall be deemed contrary to public policy and shall be void and unenforceable.

**History.** Acts 1989, No. 264, §§ 7-9;  
1993, No. 1048, § 1.

**RESEARCH REFERENCES**

**ALR.** Construction and Applicability of Membership Contracts or Fees. 48 State Statutes Governing Health Club A.L.R.6th 223.

**4-94-106. Registration statement.**

(a) Any person, corporation, partnership, association, or group intending to open or operate a health spa shall file an annual registration statement with the office of the Secretary of State prior to the sale of any contracts for health spa services.

(b) The registration statement shall contain:

(1) The name and address of the health spa;

(2) The names and addresses of the officers, directors, and stockholders of the health spa and its parent corporation, if such entity exists; and

(3) The types of available facilities.

**History.** Acts 1989, No. 264, § 10.

**4-94-107. Payment period.**

No contract for health spa services shall require payments or financing by the buyer over a period in excess of twenty-five (25) months from the date the contract is entered into, nor shall the term of any contract be measured by or be for the life of the buyer; however, the availability of the health spa facilities to the buyer and under the contract may extend over a period not to exceed two (2) years from the date the

contract is entered into, with the right to renew for additional periods of equal length.

**History.** Acts 1989, No. 264, § 4.

#### **4-94-108. Time for performance.**

(a) Every contract for health spa services to be rendered at an existing health spa facility shall provide that the performance of the agreed-upon services will begin within forty-five (45) days from the date the contract is entered into.

(b) Every contract for health spa services at a planned spa facility or spa facility under construction shall, at the option of the buyer, be voidable in the event that the health spa facilities and the agreed-upon services are not available within one hundred eighty (180) days from the date the contract is entered into.

**History.** Acts 1989, No. 264, § 5.

#### **4-94-109. Cancellation of contracts.**

(a)(1) Contracts for health spa services may be cancelled within three (3) business days after the date of receipt by the buyer of a copy of the contract by written notice to the seller at the address specified in the contract.

(2) The notice must be accompanied by the contract forms, membership cards, and any and all other documents and evidence of membership previously delivered to the buyer.

(3) All moneys paid pursuant to the contract shall be refunded within thirty (30) days of receipt of the notice of cancellation.

(b)(1) Every contract for health spa services shall provide that, after the three-day period of cancellation as provided in subsection (a) of this section, the buyer's estate may cancel a contract for services if the buyer dies.

(2) The buyer may also cancel after three (3) days if the buyer becomes totally and permanently physically disabled or moves his or her residence to a location more than fifty (50) miles from a health club operated by the seller or a substantially similar health club facility which would accept the seller's obligation under the contract or after the services are no longer available as provided in the contract because of the seller's permanent discontinuance of operation.

(3) Nothing contained in this section or § 4-94-108 shall restrict or prohibit the seller from offering or providing in the contract additional or broader reasons for cancellation.

(c)(1) The health spa shall have the right to require and verify reasonable evidence of permanent physical relocation, permanent physical disability, or death.

(2) In the case of permanent disability, the health spa may also require in the contract that the buyer submit to a physical examination by a doctor agreeable to the buyer and the health club.

(d) All moneys paid pursuant to any contract cancelled for the reasons contained in this section shall be refunded within thirty (30) days of receipt of the notice of cancellation; provided, however, that the seller may retain the benefits conferred and that portion of the total price representing the services used or completed, and further provided that the seller may receive the reasonable cost of goods and services which the buyer has consumed or wishes to retain after cancellation of the contract. In no instance shall the seller receive more than the full contract price from the buyer except for goods and services consumed by the buyer separate from the contract. If the buyer has executed any credit or loan agreement to pay for all or part of health spa services, then the credit or loan agreement executed by the buyer shall also be returned within thirty (30) days.

**History.** Acts 1989, No. 264, § 5.

### RESEARCH REFERENCES

**ALR.** Construction and Applicability of Membership Contracts or Fees. 48 State Statutes Governing Health Club A.L.R.6th 223.

## CHAPTER 95

### ARKANSAS MAIL AND TELEPHONE CONSUMER PRODUCT PROMOTION FAIR PRACTICES ACT

#### SECTION.

- 4-95-101. Title.
- 4-95-102. Definitions.
- 4-95-103. Penalties — Criminal.
- 4-95-104. Penalties — Civil.
- 4-95-105. Offers of gifts or prizes.

#### SECTION.

- 4-95-106. Purchase agreements generally.
- 4-95-107. Exemptions.
- 4-95-108. Violation of subchapter renders agreement void — Waiver.

#### 4-95-101. Title.

This chapter may be known and cited as the “Arkansas Mail and Telephone Consumer Product Promotion Fair Practices Act”.

**History.** Acts 1991, No. 680, § 1.

#### 4-95-102. Definitions.

As used in this chapter, unless the context otherwise requires:

- (1) “Consumer product” means a good or service purchased, leased, or rented primarily for personal, family, or household purposes, including a course of instruction or training, regardless of the purpose for which it is taken;
- (2) “Division” means the Consumer Protection Division of the Office of the Attorney General as created under § 4-88-105;
- (3) “Gift or prize” means any premium, bonus, award, or any other similar language of inducement or incentive to purchase a consumer product;

(4) “Pay-per-call” means telecommunications services which permit simultaneous calling by a large number of callers to a single telephone number and for which the calling party is assessed, by virtue of completing the call, a charge that is not dependent on the existence of a presubscription relationship and for which the caller pays a per-call or per-time interval charge that is greater than, or in addition to, the charge for transmission of the call;

(5) “Person” means any individual, organization, group, association, partnership, corporation, or any combination of them; and

(6)(A) “Product promoter” means any person who individually or through an agent and by means of a written notice sent through the mail or by telephone:

(i) Offers a gift, prize, or award with the intent to sell, lease, or rent any consumer product;

(ii) Solicits to sell, lease, or rent a consumer product, in which the consumer product and all the material terms of the transaction, including the price, handling, shipping, delivery, or any other fee are not fully described and which requests the consumer contact the seller to complete the transaction; or

(iii) Offers by gift, prize, or award any consumer product in which all material terms regarding the requirements of receiving such gift, prize, or award are not fully described.

(B) The term “product promoter” does not include any activities of nonprofit or charitable organizations exempt from federal income taxation under § 501(c)(3) of the United States Internal Revenue Code, 26 U.S.C. § 501(c)(3).

**History.** Acts 1991, No. 680, § 2; 1993, No. 139, §§ 1, 2. \*

#### **4-95-103. Penalties — Criminal.**

Any person who knowingly commits a practice defined as unlawful in this chapter shall be guilty of a Class B misdemeanor and upon conviction in the appropriate court of any county in this state in which any portion of the unlawful practice occurred shall be subject to punishment accordingly. If the amount in question solicited exceeds two hundred dollars (\$200), the offense shall constitute a Class D felony.

**History.** Acts 1991, No. 680, § 6; 1993, No. 139, § 3; 1995, No. 1296, § 1.

#### **4-95-104. Penalties — Civil.**

In addition to the criminal penalty imposed in § 4-95-103, the Consumer Protection Division shall have authority to file a petition in the Pulaski County Circuit Court for civil enforcement of the provisions of this chapter by seeking an injunction prohibiting any person, firm, partnership, corporation, or any other entity from engaging in any unlawful practice. Violation of any of the provisions of this chapter shall

constitute an unfair or deceptive act or practice as defined by the Deceptive Trade Practices Act, § 4-88-101 et seq. All remedies, penalties, and authority granted to the Attorney General under the Deceptive Trade Practices Act, § 4-88-101 et seq., shall be available to him or her or the enforcement of this chapter.

**History.** Acts 1991, No. 680, § 7; 1993, No. 139, § 4.      cuit courts, Ark. Const. Amend. 80, §§ 6, 19.

**Cross References.** Jurisdiction of cir-

#### **4-95-105. Offers of gifts or prizes.**

(a) It shall be an unlawful practice under this chapter for any product promoter to enforce or to attempt to enforce an agreement for a consumer product not in compliance with the requirements of this chapter.

(b) It shall be an unlawful practice under this chapter for any person to offer a gift, prize, or award by means of written notice sent through the mail or by telephone with the intent to sell, lease, or rent a consumer product, or to initiate the sale, lease, or rental of a consumer product when, at the time of such offer, the consumer product and all the material terms of the transaction, including the price, handling, shipping, delivery, or any other fee, are not fully described, unless done so in compliance with this chapter.

(c) It shall be an unlawful practice for any person to offer a gift, prize, or award by means of written notice sent through the mail or by telephone with the intent to receive a payment of any money when at the time of such offer all of the material terms of the transaction, including handling, shipping, delivery, or any other fee, are not fully described and:

(1) Which requests the consumer to further the transaction by calling a 900 number or "pay-per-call"; or

(2) Which requests the consumer to send payment to claim the prize.

**History.** Acts 1991, No. 680, § 3; 1993, No. 139, §§ 5, 6.

#### **4-95-106. Purchase agreements generally.**

(a) Any agreement by a consumer to obtain a consumer product from a product promoter is not enforceable unless it is in writing, it contains the signature of the consumer, and it contains the following information:

(1) The name and address and telephone number of the product promoter;

(2) A list of the price or fee, including any handling, shipping, delivery, or other charges, being requested from the consumer;

(3) The date of the transaction;

(4) A detailed description of the consumer product; and

(5) In a type size of a minimum of 12-points, in a space immediately preceding the space allotted for the consumer's signature, the disclosure statement: "YOU ARE NOT OBLIGATED TO PAY ANY MONEY UNLESS YOU SIGN THIS CONTRACT AND RETURN IT TO THE SELLER."

(b)(1) If the consumer sends a payment to the product promoter in the form of cash, check, money order, or other form of payment without having included a signed copy of the agreement to obtain the consumer product, the consumer may cancel the transaction by notifying the product promoter in writing by certified mail with return receipt requested and returning the consumer product to the product promoter in substantially the same condition as he or she received the product.

(2) A product promoter who has received written notice of cancellation from a consumer, within ten (10) business days of the receipt of the notice, shall:

(A) Refund all payments made, including any down payment made under the agreement;

(B) Return any good or product traded in to the product promoter on account of or in contemplation of the agreement, in substantially the same condition as when it was received by the product promoter; and

(C) Take any action necessary or appropriate to terminate promptly any security interest created in connection with the agreement.

(c) A consumer product transaction is considered to have taken place in the State of Arkansas, regardless of the location of the product promoter, when the consumer has received an offer of a gift or prize or an initiation of a product transaction from the product promoter through the mail at an address within the state or through a telephone contact at a site within the state.

**History.** Acts 1991, No. 680, § 4.

#### **4-95-107. Exemptions.**

This chapter shall not apply to a consumer product transaction:

(1) That has been made in accordance with prior negotiations in the course of a visit by the consumer to a merchant operating a business establishment that has a fixed permanent location and where the consumer products are displayed or offered for sale, lease, or rent on a continuing basis;

(2) When the business establishment making the solicitation has made a related prior sale to the consumer or has a clear, continuing business relationship with the consumer, provided that the relationship resulted in the consumer's becoming aware of the full name, business address, and telephone number of the establishment; or

(3) When the consumer obtains a consumer product pursuant to an examination of a television, radio, or print advertisement or a sample

brochure, catalog, or other mailed material of the product promoter which contains:

(A) The name, address, and telephone number of the product promoter;

(B) A full description of the consumer product along with a list of the price or fee being requested, including any handling, shipping, or delivery charge; and

(C) Any limitations or restrictions that apply to the offer.

**History.** Acts 1991, No. 680, § 5; 1993, No. 139, § 7.

#### **4-95-108. Violation of subchapter renders agreement void — Waiver.**

(a) Any agreement for sale, lease, or rent of a consumer product by a product promoter in violation of this chapter is void and unenforceable.

(b) Any waiver or attempt to waive any of the provisions of this chapter shall be void and unenforceable.

**History.** Acts 1991, No. 680, § 8.

## **CHAPTER 96**

### **FARM MACHINERY**

#### **SUBCHAPTER.**

1. GENERAL PROVISIONS. [RESERVED.]
2. HOUR METERS ON FARM MACHINERY.

#### **SUBCHAPTER 1 — GENERAL PROVISIONS**

[Reserved]

#### **SUBCHAPTER 2 — HOUR METERS ON FARM MACHINERY**

#### **SECTION.**

4-96-201. Alteration prohibited.

4-96-202. Conspiracy to violate subchapter — Penalties.

#### **4-96-201. Alteration prohibited.**

(a) No person shall knowingly tamper with, adjust, alter, change, set back, disconnect, or, with intent to defraud, fail to connect the hour meter of any farm machinery, or cause any of the foregoing to occur to an hour meter of any farm machinery, so as to reflect fewer hours than the farm machinery has actually been operated.

(b) No person, with the intent to defraud, shall operate any farm machinery knowing that the hour meter is disconnected or nonfunctional.

- (c) No person shall advertise for sale, sell, use, or install on any part of any farm machinery or on any hour meter on any farm machinery any device which causes the hour meter to register any hours other than the true hours of operation.
- (d) No person shall sell or offer for sale any farm machinery with knowledge that the hours registered on the hour meter have been altered so as to reflect fewer hours than the farm machinery has actually been operated without disclosing such fact to prospective purchasers.

**History.** Acts 1991, No. 186, § 1.

**4-96-202. Conspiracy to violate subchapter — Penalties.**

- (a) No person shall conspire with any other person to violate this subchapter.
- (b) Any person who is found to have violated the provisions of this subchapter shall be guilty of a Class A misdemeanor.
- (c)(1) A violation of this subchapter shall constitute an unfair or deceptive act or practice as defined by the Deceptive Trade Practices Act, § 4-88-101 et seq.
- (2) All remedies, penalties, and authority granted to the Attorney General under the Deceptive Trade Practices Act, § 4-88-101 et seq., shall be available to the Attorney General for the enforcement of this subchapter.

**History.** Acts 1991, No. 186, § 1; 1993, No. 908, § 1; 2005, No. 1994, § 219.

**CHAPTER 97**  
**RETAIL PET STORES**

SECTION.

- 4-97-101. Title.
- 4-97-102. Legislative intent.
- 4-97-103. Definitions.
- 4-97-104. Registration required.
- 4-97-105. Consumer guarantees.

SECTION.

- 4-97-106. Public health — Enforcement.
- 4-97-107. Unlawful disposition of animals.
- 4-97-108. Inspection — Public notice.
- 4-97-109. Applicability to other laws.

**Effective Dates.** Acts 1991, No. 1225, § 12: April 10, 1991. Emergency clause provided: “It is hereby found and declared that abuses exist within the pet store industry regarding selling sick and injured animals to the public; failing to provide consumer guarantees for these animals consistent with their status as companions; failing to provide appropriate time for the animals outside of cages for healthful exercise and socialization;

failing to provide proper veterinary care; maintaining unsanitary and otherwise unhealthful conditions; and inhumane methods of killing sick and unwanted animals, and animals returned for failure of guarantee; that this act is designed to minimize or eliminate such abuses and should be given effect immediately. Therefore, an emergency is hereby declared to exist, and this act being necessary for the immediate preservation of the public

peace, health, safety and welfare, shall be in full force and effect from and after the date of its passage and approval."

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#### **4-97-101. Title.**

This chapter may be cited as the "Arkansas Retail Pet Store Consumer Protection Act of 1991".

**History.** Acts 1991, No. 1225, § 1.

#### **4-97-102. Legislative intent.**

It is the purpose of this chapter to require certain guarantees from retail pet stores to the purchasers of dogs and cats which are consistent with their unique status as companions rather than commodities. A further purpose is to provide a means by which it can be ensured that the treatment, care, and disposition of those animals is humane and that the treatment, care, and disposition are consistent with providing to the retail consumer animals which are physically and temperamentally sound, healthy, and fit as companions; to provide a means by which the acquisition and care of those animals can be monitored; and to ensure that the animals and facilities are managed in a manner noninjurious to the public health. Therefore, it is hereby determined and declared that the supervision by the state of the sale of dogs and cats by retail pet stores, and the inspection of such animals, whether or not found within the public area of the store, is within the public interest.

**History.** Acts 1991, No. 1225, § 2.

#### **4-97-103. Definitions.**

For the purposes of this chapter:

- (1) "Animal" means a dog or cat of any age;
- (2) "Authorized person" means the Director of the Department of Health or his or her delegate, or any law enforcement officer;
- (3) "Cattery" means an enterprise wherein or whereon the business of grooming or boarding cats, or breeding cats for sale, and selling those cats, is carried on, and which does not in its usual course of business acquire cats for resale to the public;
- (4) "Consumer" means any individual purchasing an animal from a retail pet store. A retail pet store shall not be considered a consumer;
- (5) "D.V.M." means a person who has graduated from an accredited school of veterinary medicine or has received equivalent formal education, and who has a valid license to practice veterinary medicine within the State of Arkansas;
- (6) "Director" means the Director of the Department of Health;

(7) "Euthanasia" means the humane killing of an animal accomplished by a method that utilizes anesthesia produced by an agent that causes painless loss of consciousness and subsequent death, and administered by a licensed veterinarian or a euthanasia technician licensed by the Drug Enforcement Administration and certified by the Department of Health;

(8) "Kennel" means an enterprise wherein or whereon the business of grooming or boarding dogs, or breeding dogs for sale, and selling such dogs, is carried on, and which does not in its usual course of business acquire dogs for resale to the public;

(9) "Person" means any individual, partnership, firm, joint-stock company, corporation, association, trust, estate, or other legal entity;

(10) "Records" of a retail pet store means:

(A) The permanent record of each animal's health history showing the animal's vaccinations, inoculations, wormings, and other veterinary medical procedures performed on that animal; and

(B) The permanent journal giving a perpetual, sequential listing of animals which are kept at the retail pet store for thirty (30) days or longer. The journal shall contain the animal's identifying number, arrival date, exit date, and disposition; and

(11)(A) "Retail pet store" means any room or group of rooms, run, cage, compartment, exhibition pen, or tether, any part of which is within the State of Arkansas, wherein any animal is sold or kept, displayed, or offered for sale, to the public. It excludes kennels and catteries which sell animals directly to consumers. Also excluded are duly authorized animal shelters and duly incorporated humane societies dedicated to the care of unwanted animals which make those animals available for adoption, whether or not a fee for such adoption is charged.

(B) As used in this chapter, the term "retail pet store" includes its owners, officers, agents, operators, managers, and employees, and refers to any such enterprise whether in fact registered or not.

**History.** Acts 1991, No. 1225, § 3.

#### **4-97-104. Registration required.**

(a)(1) Any person who owns, operates, or establishes a retail pet store within the State of Arkansas shall register, by reporting in writing to the director:

(A) The name of the retail pet store;

(B) The location of each housing facility for animals owned by it, or in its care, custody, or control;

(C) The name and address of its principal agent; and

(D) The date its operation began.

(2) The report shall reflect the name and position of the individual under whose direction it is prepared and shall be made under oath before a notary public.

(b) Each registration shall be valid for a period of one (1) year. On or before the anniversary date of the original registration, reregistration shall be required, except that if at any time prior to the required reregistration date the information originally reported to the director changes or requires additions, that fact shall be reported to the director without delay.

(c)(1) A retail pet store in operation on or before April 10, 1991, shall register within ninety (90) days after April 10, 1991.

(2) A retail pet store which begins operation within ninety (90) days after April 10, 1991, shall register within thirty (30) days after the beginning of operation.

(3) A retail pet store which begins operation subsequent to ninety (90) days after April 10, 1991, shall register at least thirty (30) days prior to the beginning of operation.

(4) The date of the first acquisition of an animal for retail sale shall be deemed the date on which the operation begins.

(d) A fee of one hundred dollars (\$100) shall accompany the initial registration, and a fee of fifty dollars (\$50.00) shall accompany each subsequent reregistration. No fee shall be required for interim reports of change or addition.

(e) Each instance of failure to register or report as required by this chapter is a Class A misdemeanor.

(f)(1) The director shall maintain a list of registered retail pet stores containing all information reported with the initial registration, including the date thereof, and the dates and information provided with all subsequent amendments and reregistrations.

(2) The director shall make the list of registered retail pet stores available to the public, upon request, at no charge.

**History.** Acts 1991, No. 1225, § 4.

#### **4-97-105. Consumer guarantees.**

(a)(1) A retail pet store shall provide to the consumer at the time of sale of an animal a written notice, printed or typed, setting forth the rights provided in subsection (b) of this section.

(2) The notice of rights shall have added to it by the retail pet store:

(A) The animal's identifying number;

(B) A description of the animal, including its breed, sex, and color;

(C) The date of sale;

(D) The name, address, and telephone number of the consumer;

and

(E) The sales price of the animal.

(3)(A) The notice may be contained in a written contract, an animal history certificate, or a separate document, provided such notice is in 10-point boldface type.

(B) The retail pet store shall certify the information by signing the document in which it is contained.

(b)(1) If, within ten (10) days following the sale of an animal subject to this chapter, a licensed veterinarian of the consumer's choosing certifies such animal to be unfit for purchase due to illness, a congenital malformation which adversely affects the health of the animal, or the presence of symptoms of a contagious or infectious disease, the retail pet store, in addition to any other warranty, shall afford the consumer the right to retain the animal and to receive reimbursement from the retail pet store for veterinary services from a licensed veterinarian of the consumer's choosing, for the purpose of curing or attempting to cure the animal.

(2) The reasonable value of reimbursable services rendered to cure or attempt to cure the animal shall not exceed the purchase price of the animal. The value of such services is reasonable if comparable to the value of similar services rendered by other licensed veterinarians in proximity to the treating veterinarian.

(3) The reimbursement shall not include the costs of initial veterinary examination fees and diagnostic fees not directly related to the veterinarian's certification that the animal is unfit for purchase pursuant to this section.

(c) The certification that an animal is unfit for purchase, which shall be provided by an examining veterinarian to a consumer upon the examination of an animal subject to the provisions of this section, shall include, but not be limited to, information which identifies the type of animal, its breed, sex, and color, the owner, the date, and diagnosis of the animal, the treatment recommended if any, and an estimate or the actual cost of such treatment. Such form shall also include the notice prescribed in subsection (a) of this section.

(d)(1) The reimbursement required by subsection (b) of this section shall be made by the retail pet store not later than ten (10) business days following receipt of a signed veterinary certification as herein required.

(2) Such certification shall be presented to the retail pet store not later than three (3) business days following receipt thereof by the consumer.

(e)(1) A veterinary finding of intestinal parasites shall not be grounds for declaring the animal unfit for sale unless the animal is clinically ill due to such condition.

(2) An animal may not be found unfit for sale on account of an injury sustained or illness contracted subsequent to the consumer's taking possession thereof.

(f)(1) In the event that a retail pet store wishes to contest a demand for reimbursement made by a consumer pursuant to this section, such retail pet store shall have the right to require the consumer to produce the animal for examination by a licensed veterinarian designated by such retail pet store.

(2) Upon such examination, if the consumer and the retail pet store are unable to reach an agreement within ten (10) business days following receipt of the animal for such examination, the consumer may

initiate an action in a court of competent jurisdiction to recover or obtain such reimbursement.

(g) Nothing in this section shall be construed in any way to limit the rights or remedies which are otherwise available to a consumer under any law.

**History.** Acts 1991, No. 1225, § 5.

#### **4-97-106. Public health — Enforcement.**

The State Board of Health may propose, adopt, promulgate, and enforce, in accordance with the Arkansas Administrative Procedure Act, § 25-15-201 et seq., such additional rules, regulations, and standards as may be necessary to carry out the intent of this chapter.

**History.** Acts 1991, No. 1225, § 6.

#### **4-97-107. Unlawful disposition of animals.**

(a) It is unlawful for a retail pet store to knowingly give, sell, exchange, barter, or otherwise transfer an animal to any other person if the ultimate destination of the animal is research or killing for dissection.

(b) It is unlawful for a retail pet store to kill any animal in its care, custody, or control without a prior written or oral recommendation from a doctor of veterinary medicine citing the animal's interest justifying the killing of the animal.

(c) It is unlawful for a retail pet store, its owners, officers, agents, operator, manager, or employees, or any other person, to kill any animal in its care, custody, or control by any means other than euthanasia as defined in § 4-97-103.

(d) A violation of this chapter or a regulation promulgated hereunder shall constitute a Class A misdemeanor.

**History.** Acts 1991, No. 1225, § 7.

#### **4-97-108. Inspection — Public notice.**

(a) Any authorized person is entitled to inspect the premises and records of a retail pet store at reasonable hours.

(b) Retail pet stores shall make their premises available for inspection by authorized persons at reasonable hours.

(c) Each failure to make premises or records available to an authorized person whose identity is made known to an owner, officer, agent, operator, manager, or employee of a retail pet store is a Class A misdemeanor.

(d)(1)(A) Every retail pet store required to be registered shall post a public notice on each of its premises, in type not less than one inch (1") in height, in a location conspicuous to the public, that complaints regarding treatment or care of its animals may be made to the State Board of Health or to any law enforcement officer.

(B) The public notice shall refer to this chapter.

(2) Failure to post the public notice is a Class A misdemeanor.

(e) Within thirty (30) days of the receipt by the director of an initial registration report, and the receipt of proper fees therefor, the director shall provide a public notice conforming with subsection (d) of this section to the registrant. Additional public notices for multiple locations and replacements of notices already provided may be obtained from the director upon the payment of a fee of ten dollars (\$10.00) for each additional public notice.

**History.** Acts 1991, No. 1225, § 8.

**4-97-109. Applicability to other laws.**

Nothing in this chapter shall be construed to prevent or limit the application of any other law.

**History.** Acts 1991, No. 1225, § 10.

**CHAPTER 98**

**ARKANSAS PAY-PER-CALL CONSUMER PROTECTION  
ACT**

SECTION.

- 4-98-101. Title.
- 4-98-102. Definitions.
- 4-98-103. Information and disclosure message.

SECTION.

- 4-98-104. Advertisement requirements.
- 4-98-105. Remedies.

**RESEARCH REFERENCES**

**C.J.S.** 86 C.J.S., Tel. §§ 79, 80, 84, 85, 99, 100, 102-106.

**4-98-101. Title.**

This chapter shall be known and may be cited as the “Arkansas Pay-Per-Call Consumer Protection Act”.

**History.** Acts 1993, No. 203, § 1.

**4-98-102. Definitions.**

For the purposes of this chapter, unless the context otherwise requires:

(1) “Information provider” means any person, company, or corporation that controls the content of a pay-per-call service. Any telephone

corporation that provides basic local exchange service or message telecommunication service which only transmits pay-per-call service but which does not control the content of the information transmitted is not included within this definition; and

(2) "Pay-per-call service" means any telecommunications service which permits calling by a number of callers to a single telephone number and for which the calling party is assessed by virtue of completing the call a charge that is not dependent on the existence of a presubscription relationship and for which the caller pays a per-call or per-time interval charge that is greater than or in addition to the charge for the transmission of the call.

**History.** Acts 1993, No. 203, § 2.

#### **4-98-103. Information and disclosure message.**

(a)(1) An information provider that offers pay-per-call services in this state shall provide a minimum of twelve (12) seconds of delayed timing for an information and disclosure message which shall be reasonable in speed so as to be clearly understandable.

(2) A three-second period of silence shall follow the information and disclosure message.

(3) If the consumer disconnects the call within the delayed timing period, or within three (3) seconds after the delayed timing period, no information charge shall be billed to the caller.

(4) If the delayed timing period is exceeded, a consumer shall be billed from the time of the initial connection, and transport charges shall be billed to the information provider from the time of the initial connection.

(5) During the delayed timing period, the information provider shall inform the consumer of all of the following:

(A) An accurate description of the service that will be provided to the caller;

(B) An accurate summation of the cost of the service including, but not limited to, all of the following:

(i) The initial flat rate charge, if any;

(ii) The charge per minute, if any; and

(iii) The maximum charge per call;

(C) That, if the caller disconnects the call within the delayed timing period, the consumer will not be charged for the call; and

(D) Before the end of the delayed timing period, that the billing will commence after a specified event following the disclosure message, such as a signal tone.

(b) Any information charges and price disclosure message associated with a pay-per-call service that is aimed at or likely to be of interest to children under the age of eighteen (18) years must contain a statement that the caller should hang up unless he or she has parental permission.

(c)(1) A caller may be provided the means to bypass the information and disclosure message on subsequent calls, provided that the caller has sole control of that capability, except that any bypass device shall be disabled for a period of thirty (30) days following the effective date of a price increase for the service.

(2) Instructions on how to bypass must be either at the end of the preamble message or at the end of the service.

(d) When an information provider's pay-per-call service results in a total potential cost of two dollars (\$2.00) or less, or if the call is being provided for polling services, asynchronous or computerized data transmission technology, or political fundraising, the provisions of this section shall not apply.

**History.** Acts 1993, No. 203, § 3.

#### **4-98-104. Advertisement requirements.**

Any information provider offering pay-per-call service shall utilize advertising that accurately describes the message content, terms, conditions, and price of the offered service in a clear and understandable manner in all print, broadcast, or telephone advertising and announcements promoting its offers, including:

(1) The per call charges, or, if the call is billed on a usage-sensitive basis, the rates by minute or other unit of time, any minimum charges, and the total cost for calls to that service if the duration of the service can be determined;

(2) Any geographic, time-of-day, or other limitations on the availability of the offer;

(3) A requirement that callers under eighteen (18) years of age must request parental or adult guardian permission before calling to hear the offer;

(4) Display of the charges in broadcast advertising with the telephone numbers and a voice announcement of the charges during the course of the commercials;

(5) Repeated voice announcements of these charges at regular intervals for commercials in excess of two (2) minutes; and

(6) Charges for all subsequent calls if the program refers to and requires another pay per call.

**History.** Acts 1993, No. 203, § 4.

#### **4-98-105. Remedies.**

(a)(1) Any consumer injured by a violation of this chapter may bring an action for the recovery of damages.

(2) Judgment may be entered for three (3) times the amount at which the actual damages are assessed, plus costs and reasonable attorney's fees.

(b)(1) Violation of any of the provisions of this chapter shall constitute an unfair or deceptive act or practice as defined by the Deceptive Trade Practices Act, § 4-88-101 et seq.

(2) All remedies, penalties, and authority granted to the Attorney General under the Deceptive Trade Practices Act, § 4-88-101 et seq., shall be available to him or her for the enforcement of this chapter.

(c)(1) No private action may be brought under the provisions of this chapter more than two (2) years after the cause of action accrues.

(2) A cause of action shall be deemed to have accrued when the party bringing an action under the provisions of this chapter knows or in the exercise of reasonable care should have known about the violation of the provisions of this chapter.

**History.** Acts 1993, No. 203, § 5.

## CHAPTER 99

### REGULATION OF TELEPHONIC SELLERS

#### SUBCHAPTER.

1. GENERAL PROVISIONS.
2. RESIDENTIAL SALES AND SOLICITATIONS.
3. CALLER IDENTIFICATION BLOCKING BY TELEPHONIC SELLERS.
4. ARKANSAS CONSUMER TELEPHONE PRIVACY ACT.

#### SUBCHAPTER 1 — GENERAL PROVISIONS

##### SECTION.

- 4-99-101. Legislative finding, declaration, and intent.
- 4-99-102. Construction.
- 4-99-103. Definitions.
- 4-99-104. Registration procedures — Fees — Duration.
- 4-99-105. Filing information.
- 4-99-106. Exemption information — Requirements.
- 4-99-107. Bond requirement — Promotions — Notice prior to inception.
- 4-99-108. Information to be provided each prospective purchaser.

##### SECTION.

- 4-99-109. Irrevocable consent appointing Attorney General to act as seller's attorney to receive service — Conditions of effective service.
- 4-99-110. Soliciting prospective purchasers on behalf of unregistered telephonic seller prohibited — Violation.
- 4-99-111. Remedies provided for violation of provisions of this chapter not exclusive — Rights of Attorney General.
- 4-99-112. Burden of proving an exemption or exception.

**A.C.R.C. Notes.** References to “this chapter” in subchapter 1 may not apply to subchapters 2, 3, or 4, which were enacted subsequently.

**Publisher's Notes.** Due to the enactment of subchapter 2 by Acts 1997, No. 1157, the existing provisions of this chap-

ter have been redesignated as subchapter 1.

**Effective Dates.** Acts 1993, No. 137, § 17: Feb. 16, 1993. Emergency clause provided: “It is hereby found and determined by the General Assembly that the widespread use of telephone solicitors to

initiate sales of goods, real property, and investment opportunities has created numerous problems for purchasers and investors which are inimical to good business practices; that telephonic sales have a significant impact upon the economy and well-being of this state and its local communities; and that this act is neces-

sary for the protection of the people of Arkansas. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

### RESEARCH REFERENCES

**Am. Jur.** 60 **Am. Jur. 2d**, Peddlers, § 114.

#### 4-99-101. Legislative finding, declaration, and intent.

(a) The General Assembly recognizes that the widespread use of telephone solicitors to initiate sales of goods, real property, and investment opportunities has created numerous problems for purchasers and investors which are inimical to good business practices. Telephonic sales have a significant impact upon the economy and well-being of this state and its local communities. However, purchasers have suffered substantial losses because of misrepresentations, lack of full and complete information regarding both the telephonic seller and the goods and investments the telephonic seller is offering, and failure of delivery. The provisions of this chapter relating to telephonic sellers are necessary for the public welfare.

(b) It is the intent of the legislature in enacting this chapter to:

(1) Provide each prospective telephonic sales purchaser with information necessary to make an intelligent decision regarding the offer made;

(2) Safeguard the public against deceit and financial hardship;

(3) Ensure, foster, and encourage competition and fair dealings among telephonic sellers by requiring adequate disclosure; and

(4) Prohibit representations that tend to mislead.

**History.** Acts 1993, No. 137, § 1.

#### 4-99-102. Construction.

This chapter shall be construed liberally in order to achieve these purposes.

**History.** Acts 1993, No. 137, § 1.

#### 4-99-103. Definitions.

As used in this chapter:

(1) "Caller identification service" means a service offered by a telecommunications provider that provides caller identification information to a device capable of displaying the information;

(2) "Consumer Protection Division" means the Consumer Protection Division of the Office of the Attorney General;

(3) "Item" means any goods and services and includes coupon books which are to be used with businesses other than the seller's business;

(4) "Owner" means a person who owns or controls ten percent (10%) or more of the equity of or otherwise has claim to ten percent (10%) or more of the net income of a telephonic seller;

(5) "Person" includes an individual, firm, association, corporation, partnership, joint venture, or any other business entity;

(6) "Principal" means an owner, an executive officer of a corporation, a general partner of a partnership, a sole proprietor of a sole proprietorship, a trustee of a trust, or any other individual with similar supervisory functions with respect to any person;

(7) "Purchaser" or "prospective purchaser" means a person who is solicited to become or does become obligated to a telephonic seller;

(8) "Salesperson" means any individual employed, appointed, or authorized by a telephonic seller, whether referred to by the telephonic seller as an agent, representative, or independent contractor, who attempts to solicit or solicits a sale on behalf of the telephonic seller. The principals of a seller are themselves salespersons if they solicit sales on behalf of the telephonic seller; and

(9) "Telephonic seller" or "seller" means a person who on his or her own behalf or through salespersons causes a telephone solicitation or attempted telephone solicitation to occur which meets the criteria specified in subdivision (9)(A) or (B) of this section, and who is not exempted by subdivision (9)(C) of this section, as follows:

(A) A telephone solicitation or attempted telephone solicitation wherein the telephonic seller initiates telephonic contact with a prospective purchaser and represents or implies one (1) or more of the following:

(i) That a prospective purchaser who buys one (1) or more items will also receive additional or other items, whether or not of the same type as purchased, without further cost. For purposes of this subdivision (9)(A)(i), "further cost" does not include actual postage or common carrier delivery charges, if any;

(ii) That a prospective purchaser will receive a prize or gift if the person also encourages the prospective purchaser to do either of the following:

(a) Purchase or rent any goods or services; or

(b) Pay any money, including, but not limited to, a delivery or handling charge;

(iii) That a prospective purchaser is able to obtain any item or service at a price which the seller states or implies is below the regular price of the item or service offered. This subdivision (9)(A)(iii) shall not apply to retailers who within the previous twelve (12)

months have sold a majority of their goods or services through in-person sales at retail stores;

(iv) That the seller is a person other than the person he or she is;

(v) That the items for sale are manufactured or supplied by a person other than the actual manufacturer or supplier;

(B)(i) A solicitation or attempted solicitation which is made by telephone in response to inquiries generated by unrequested notifications sent by the seller to persons who have not previously purchased goods or services from the seller or who have not previously requested credit from the seller to a prospective purchaser wherein the seller represents or implies to the recipient of the notification that any of the following applies to the recipient:

(a) That the recipient has in any manner been specially selected to receive the notification or the offer contained in the notification;

(b) That the recipient will receive a prize, gift, or award if the recipient calls the seller; or

(c) That, if the recipient buys one (1) or more items from the seller, the recipient will also receive additional or other items, whether or not of the same type as purchased, without further cost or at a cost which the seller states or implies is less than the regular price of such items.

(ii) This subdivision (9)(B) does not apply to the solicitation of sales by a catalogue seller who periodically issues and delivers catalogues to potential purchasers by mail or by other means. This exception only applies if the catalogue includes a written description or illustration and the sales price of each item or merchandise offered for sale includes at least twenty-four (24) full pages of written material or illustrations, is distributed in more than one (1) state, and has an annual circulation of no fewer than two hundred fifty thousand (250,000) customers;

(C) As used in this chapter, "telephonic seller" or "seller" does not include any of the following:

(i) A person offering or selling a security and who is registered pursuant to § 23-42-301 et seq.;

(ii) A person offering or selling insurance and who is licensed pursuant to § 23-64-201 et seq.;

(iii) A person primarily soliciting the sale of a newspaper of general circulation, a magazine, or membership in a book or record club whose program operates in conformity with § 4-89-101 et seq. and § 4-95-101 et seq.;

(iv) A person soliciting business from prospective purchasers who have previously purchased from the business enterprise for which the person is calling;

(v)(a) A person soliciting without the intent to complete and who does not complete the sales presentation during the telephone solicitation but completes the sales presentation at a later face-to-face meeting between the solicitor and the prospective purchaser.

(b) However, if a seller, directly following a telephone solicitation, causes an individual whose primary purpose it is to go to the

prospective purchaser to collect the payment or deliver any item purchased, this exemption does not apply;

(vi) Any supervised financial institution or parent, subsidiary, or affiliate thereof. As used in this subdivision (9)(C)(vi), "supervised financial institution" means any commercial bank, trust company, savings and loan association, credit union, industrial loan company, personal property broker, consumer finance lender, commercial finance lender, or insurer, provided that the institution is subject to the supervision of an official or agency of this state or of the United States;

(vii) Any burial association operating pursuant to the authority of § 23-78-101 et seq.;

(viii) A person or an affiliate of a person whose business is regulated by the Arkansas Public Service Commission;

(ix) An issuer or a subsidiary of an issuer that has a class of securities which is subject to and which is either registered or exempt from registration to § 23-42-401 et seq.;

(x) A person soliciting a transaction regulated by the Commodity Futures Trading Commission if the person is registered or temporarily licensed for this activity with the Commodity Futures Trading Commission under the Commodity Exchange Act, 7 U.S.C. § 1 et seq., and the registration or license has not expired or been suspended or revoked; or

(xi) A person soliciting a transaction directed to a purchaser holding a permit pursuant to the Arkansas Gross Receipts Act, § 26-52-101 et seq., and in which the solicitation deals with goods of a type that are subject to resale by the purchaser.

**History.** Acts 1993, No. 137, §§ 2, 3; 1995, No. 440, § 1; 2003, No. 1465, § 3.

#### RESEARCH REFERENCES

**U. Ark. Little Rock L. Rev.** Survey of assembly, Business Law, 26 U. Ark. Little Rock L. Rev. 351.

#### 4-99-104. Registration procedures — Fees — Duration.

(a)(1) Not less than ten (10) days prior to doing business in this state, a telephonic seller shall register with the Consumer Protection Division of the Office of the Attorney General by filing the information required by this chapter and a filing fee of one hundred dollars (\$100).

(2) A seller shall be deemed to do business in this state if the seller solicits prospective purchasers from locations in this state or solicits prospective purchasers who are located in this state.

(b) Registration of a telephonic seller shall be valid for one (1) year from the effective date thereof and may be renewed by making the filing required by this chapter and paying a filing fee of one hundred dollars (\$100).

(c) The information required by this chapter shall be submitted on a form prescribed by the Attorney General and shall be verified by a declaration signed by each principal of the telephonic seller under penalty of perjury.

(d) Whenever, prior to expiration of a seller's annual registration, there is a material change in the information required under this chapter, the seller shall, within ten (10) days, file an addendum updating the information with the division. However, changes in salespersons soliciting on behalf of a seller shall be updated in quarterly intervals computed from the effective date of registration.

(e)(1) Upon receipt of a filing and filing fee pursuant to subsection (a) or (b) of this section, the division shall send the telephonic seller a written confirmation of registration.

(2) If the seller has more than one (1) business location, the confirmation of registration shall be sent to the principal business location identified in the seller's filing in sufficient number so that the seller has a confirmation of registration for each location to be displayed in a conspicuous place at each of the seller's business locations and available for inspection by any governmental agency at each location.

(3) Until confirmation of registration is received and posted, the seller shall post in a conspicuous place at each of the seller's business locations within this state a copy of the first page of the registration form sent to the division.

(f)(1) Every salesperson must be employed in a principal-agent relationship by a telephonic seller registered pursuant to this chapter and shall, within seventy-two (72) hours after accepting such employment, register with the division.

(2) Application for registration shall be on a form prescribed by the Attorney General, verified by a declaration signed by each salesperson under penalty of perjury, and shall be accompanied by a fee in the sum of ten dollars (\$10.00).

(3) When effective, such registration shall be for a period of one (1) year and may be renewed upon the payment of the fee prescribed in this section for additional one-year periods.

(g) All fees collected by the Attorney General under this section shall be deposited in the State Treasury as general revenues.

**History.** Acts 1993, No. 137, § 4.

#### **4-99-105. Filing information.**

Each registration filing pursuant to this chapter shall contain the following information:

(1) The name or names of the seller, including the name under which the seller is doing or intends to do business, if different from the name of the seller, and the name of any parent or affiliated organization that will engage in business transactions with purchasers relating to sales solicited by the seller, or that accepts responsibility for statements made by, or acts of, the seller relating to sales solicited by the seller;

(2) The seller's business form and place of organization and, if the seller is a corporation, a copy of its articles of incorporation and bylaws and amendments thereto, or, if a partnership, a copy of the partnership agreement, or, if operating under a fictitious business name, the location where the fictitious name has been registered. All the same information shall be included for any parent or affiliated organization disclosed pursuant to subdivision (1) of this section;

(3)(A) The complete street address or addresses of all locations, designating the principal location from which the telephonic seller will be conducting business.

(B) If the principal business location of the seller is not in this state, then the seller shall also designate which of any locations within this state is its main location in the state;

(4) A listing of all telephone numbers to be used by the seller and the address where each telephone using each of these telephone numbers is located;

(5) The name of, and the office held by, the seller's officers, directors, trustees, general and limited partners, sole proprietor, and owners, as the case may be, and the names of those persons who have management responsibilities in connection with the seller's business activities;

(6) The complete address of the principal residence, the date of birth, and the social security number of each of the persons whose names are disclosed pursuant to subdivision (5) of this section;

(7) A list of the names and principal residence addresses of salespersons who solicit on behalf of the telephonic seller and the names the salespersons use while soliciting;

(8) A description of the items the seller is offering for sale and a copy of all sales scripts the telephonic seller requires salespersons to use when soliciting prospective purchasers or, if no sales script is required to be used, a statement to that effect;

(9) A copy of all sales information and literature, including, but not limited to, scripts, outlines, instructions, and information regarding how to conduct telephonic sales, sample introductions, sample closings, product information, and contest or premium award information provided by the telephonic seller to salespersons, or of which the seller informs salespersons, and a copy of all written materials the seller sends to any prospective or actual purchaser;

(10) If the telephonic seller represents or implies, or directs salespersons to represent or imply, to purchasers that the purchaser will receive certain specific items, including a certificate of any type which the purchaser must redeem to obtain the item described in the certificate, or one (1) or more items from among designated items, whether the items are denominated as gifts, premiums, bonuses, prizes, awards, or otherwise, the filing shall include the following:

(A) A list of the items offered;

(B) The value or worth of each item described to prospective purchasers and the basis for the valuation;

(C) The price paid by the telephonic seller to its supplier for each of these items and the name, address, and telephone number of each item's supplier;

(D) If the purchaser is to receive fewer than all of the items described by the seller, the filing shall include the following:

(i) The manner in which the telephonic seller decides which item or items a particular prospective purchaser is to receive;

(ii) The odds a single prospective purchaser has of receiving each described item; and

(iii) The name and address of each recipient who has, during the preceding twelve (12) months, or if the seller has not been in business that long, during the period the telephonic seller has been in business, received the item having the greatest value and the item with the smallest odds of being received; and

(E) All rules, regulations, terms, and conditions a prospective purchaser must meet in order to receive the item; and

(11) The name and address of the telephonic seller's agent in this state, other than the Attorney General, authorized to receive service of process in this state.

**History.** Acts 1993, No. 137, § 6.

#### **4-99-106. Exemption information — Requirements.**

(a) Any person claiming an exemption from registration as provided by this chapter shall keep full and accurate records in such form as will enable the person to provide to the Attorney General upon request the information required to substantiate an exemption under this chapter.

(b) The information provided under this section shall be verified by a declaration signed under penalty of perjury by each principal of the person claiming exemption.

**History.** Acts 1993, No. 137, § 5.

#### **4-99-107. Bond requirement — Promotions — Notice prior to inception.**

(a)(1) Every telephonic seller shall maintain a bond issued by a surety company authorized to do business in this state. The bond shall be in the amount of fifty thousand dollars (\$50,000) in favor of the State of Arkansas for the benefit of any person suffering injury or loss by reason of any violation of this chapter, to be paid under the terms of any order of a court of competent jurisdiction obtained by the Attorney General or prosecuting attorney as a result of any violation of this chapter.

(2) A copy of the bond shall be filed with the Consumer Protection Division of the Office of the Attorney General.

(b)(1) At least ten (10) days prior to the inception of any promotion offering a premium with an actual market value or advertised value of five hundred dollars (\$500) or more, the telephonic seller shall notify

the Attorney General in writing of the details of the promotion, describing the premium, its current market value, the value at which it is advertised or held out to the consumer, the date the premium shall be awarded, and the conditions under which the award shall be made.

(2)(A) The telephonic seller shall maintain an additional bond for the total current market value or advertised value, whichever is greater, of the premiums held out or advertised to be available to a purchaser or recipient. A copy of the bond shall be filed with the division.

(B) The bond or portion thereof necessary to cover the cost of the award shall be forfeited if the premium is not awarded to a bona fide customer within thirty (30) days of the date disclosed as the time of award or other time required by law.

(C) The proceeds of the bond shall be paid to any person suffering injury or loss by reason of any violation of this chapter, or shall be paid pursuant to the terms of any order of a court of competent jurisdiction obtained by the Attorney General or prosecuting attorney as a result of any violation of this chapter.

(D) The bond shall be maintained until the seller files with the Attorney General proof that the premium was awarded.

**History.** Acts 1993, No. 137, § 13.

#### **4-99-108. Information to be provided each prospective purchaser.**

(a) If the telephonic seller represents or implies that a prospective purchaser will receive, without charge therefor, certain specific items, or one (1) item from among designated items, whether the items are denominated as gifts, premiums, bonuses, prizes, awards, or otherwise, the seller shall provide, at the time the solicitation is made and prior to consummation of any sales transaction, the following:

(1) The manner in which the telephonic seller decides which item or items a particular prospective purchaser is to receive;

(2) The odds a single prospective purchaser has of receiving each described item;

(3) All rules, regulations, terms, and conditions a prospective purchaser must meet in order to receive the item;

(4) The complete street address of the location from which the salesperson is calling the prospective purchaser and, if different, the complete street address of the telephonic seller's principal location; and

(5) The total number of individuals who have actually received from the telephonic seller, during the preceding twelve (12) months or, if the seller has not been in business that long, during the period the seller has been in business, the item having the greatest value and the item with the smallest odds of being received.

(b) No seller shall make or authorize the making of any reference to its compliance with this chapter to any prospective or actual purchaser.

(c)(1) No telephonic seller under this section shall display or cause to be displayed a fictitious or misleading name or telephone number on an Arkansas resident's telephone caller identification service.

(2) Subdivision (c)(1) of this section does not apply to the transmission of caller identification service by a telecommunications provider.

**History.** Acts 1993, No. 137, §§ 7, 9; 2003, No. 1465, § 4.

### RESEARCH REFERENCES

**U. Ark. Little Rock L. Rev.** Survey of assembly, Business Law, 26 U. Ark. Little Rock L. Rev. 351.  
**Legislation,** 2003 Arkansas General As-

#### **4-99-109. Irrevocable consent appointing Attorney General to act as seller's attorney to receive service — Conditions of effective service.**

(a) Every telephonic seller shall file with the Attorney General, in the form prescribed by the Attorney General, an irrevocable consent appointing the Attorney General to act as the seller's attorney to receive service of any lawful process in any noncriminal suit, action, or proceeding against the seller or the seller's successor, executor, or administrator, which may arise under this chapter, when the agent designated in the seller's registration filing cannot with reasonable diligence be found at the address designated or if no agent has been designated pursuant thereto.

(b) When service is made upon the Attorney General in conformance with this section, it shall have the same force and validity as if served personally on the seller.

(c) Service may be made by leaving a copy of the process in the office of the Attorney General, but it shall not be effective unless both of the following are done:

(1) When service is effected pursuant to this section, the plaintiff shall forthwith send by certified first class mail, return receipt requested, a notice of the service and a copy of the process to the defendant or respondent at the last address on file with the Consumer Protection Division; and

(2) The plaintiff's affidavit of compliance with this section shall be filed in the case on or before the return date of the process, if any, or within such further time as the court allows.

**History.** Acts 1993, No. 137, § 8.

#### **4-99-110. Soliciting prospective purchasers on behalf of unregistered telephonic seller prohibited — Violation.**

(a) No salesperson shall solicit prospective purchasers on behalf of a telephonic seller who is not currently registered with the Consumer

Protection Division pursuant to this chapter. Any salesperson who violates this section shall be guilty of a Class A misdemeanor.

(b) Except as provided in subsection (a) of this section, any person, including, but not limited to, the seller, a salesperson, agent or representative of the seller, or an independent contractor, who willfully violates any provision of this chapter or who directly or indirectly employs any device, scheme, or artifice to deceive in connection with the offer or sale by any telephonic seller, or who willfully, directly or indirectly engages in any act, practice, or course of business which operates or would operate as fraud or deceit upon any person in connection with a sale by any telephonic seller shall be, upon conviction, guilty of a Class D felony.

(c) Every person who controls a seller liable under this section, or a salesperson liable under subsection (a) of this section, every partner, officer, or director of such a seller or salesperson, every person occupying a similar status or performing a similar function, and every employee of such a seller or salesperson who materially aids in the sale or attempted sale are also liable jointly and severally with and to the same extent as the seller or salesperson, unless the nonseller or nonsalesperson who is so liable sustains the burden of proof that he or she did not know and in the exercise of reasonable care could not have known of the existence of the facts by reason of which the liability is alleged to exist. There is contribution as in cases of contract among the several persons so liable.

**History.** Acts 1993, No. 137, §§ 10, 11.

#### **4-99-111. Remedies provided for violation of provisions of this chapter not exclusive — Rights of Attorney General.**

(a) The provisions of this chapter are not exclusive. The remedies specified in this chapter for violation of any section of this chapter or for conduct proscribed by any section of this chapter shall be in addition to any other procedures or remedies for any violation or conduct provided for in any other law.

(b) Violation of any of the provisions of this chapter shall constitute an unfair or deceptive act or practice as defined by the Deceptive Trade Practices Act, § 4-88-101 et seq. All remedies, penalties, and authority granted to the Attorney General under the Deceptive Trade Practices Act, § 4-88-101 et seq., shall be available to the Attorney General for the enforcement of this chapter.

**History.** Acts 1993, No. 137, § 12.

#### **CASE NOTES**

##### **Deceptive Trade Practices.**

Plaintiff's claims regarding violations of Telephonic Sellers Act and School Calendar Act were actionable under the Arkan-

sas Deceptive Trade Practices Act, § 4-88-107, even though neither Act provided a private cause of action for consumers because a violation of either statute consti-

tuted a deceptive trade practice under the ADTPA pursuant to subsection (b) of this section and § 4-88-503(a), and any person who suffered actual damage as a result of such a practice had a cause of action

under the ADTPA, § 4-88-113(f). *M.S. Wholesale Plumbing, Inc. v. Univ. Sports Pubs. Co., Inc.*, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 4159 (E.D. Ark. Jan. 7, 2008).

#### **4-99-112. Burden of proving an exemption or exception.**

In any civil proceeding alleging a violation of this chapter, the burden of proving an exemption or an exception from a definition is upon the person claiming it, and in any criminal proceeding alleging a violation of this chapter, the burden of producing evidence to support a defense based upon an exemption or an exception from a definition is upon the person claiming it.

**History.** Acts 1993, No. 137, § 2.

### **SUBCHAPTER 2 — RESIDENTIAL SALES AND SOLICITATIONS**

#### **SECTION.**

4-99-201. Caller identification — Information offered — Penalty for violation.

#### **SECTION.**

4-99-202. Collection practices.

4-99-203. Consumer's express written authorization required.

**A.C.R.C. Notes.** References to "this chapter" in subchapter 1 may not apply to

this subchapter which was enacted subsequently.

#### **4-99-201. Caller identification — Information offered — Penalty for violation.**

(a)(1) Any person who on behalf of any charity, business, or organization calls a residential phone number for the purpose of soliciting or requesting a contribution or to offer goods or services shall immediately disclose to the person contacted:

(A) The caller's identity and the identity of the person or organization on whose behalf the telephone call is being made; and

(B) The purpose of the telephone call, including a brief description of the goods or services to be offered.

(2) If the person receiving the telephone call indicates that he or she does not want to hear about the charity, goods, or services, the caller shall not attempt to provide additional information during that conversation about the charity, goods, or services.

(b) A violation of this section shall be a Class A misdemeanor.

(c)(1) A violation of the provisions of this section shall constitute an unfair and deceptive act or practice as defined by the Deceptive Trade Practices Act, § 4-88-101 et seq.

(2) All remedies, penalties, and authority granted to the Attorney General under the Deceptive Trade Practices Act, § 4-88-101 et seq.,

shall be available to the Attorney General for the enforcement of this section.

(3)(A) No person under subdivision (a)(1) of this section shall display or cause to be displayed a fictitious or misleading name or telephone number on an Arkansas resident's telephone caller identification service.

(B) For purposes of this section, "caller identification service" means a service offered by a telecommunications provider that provides caller identification information to a device capable of displaying the information.

(d) Nothing in this section limits the rights or remedies which are otherwise available to a consumer under any other law.

(e) The obligations under this section are cumulative and should in no way be deemed to limit the obligations imposed under any other law.

**History.** Acts 1997, No. 1157, § 1; 2003, No. 1465, § 5.

### RESEARCH REFERENCES

**U. Ark. Little Rock L. Rev.** Survey of Legislation, 2003 Arkansas General Assembly, Business Law, 26 U. Ark. Little Rock L. Rev. 351.

### CASE NOTES

#### **Constitutionality.**

Subsection (a)(2), which limits the solicitation activity of charities with regard to telephone calls to unwilling listeners in their homes, does not violate the First Amendment of the federal constitution since the subsection does not substantially limit charitable solicitations. Its only impact is to end solicitation calls to unwilling residents who otherwise would not hang up, it leaves open ample alternative channels of communication, it does not foreclose other forms of solicitation aimed at those unwilling residents, and does not bar additional solicitation calls to their homes. *Nat'l Fed'n of the Blind of Ark., Inc. v. Pryor*, 258 F.3d 851 (8th Cir. 2001).

Subsection (a)(2) of this section is not unconstitutionally overbroad or vague; there was no evidence that solicitors

would misread this section as prohibiting them from contacting Arkansas residents, and the term "indicates" is sufficiently clear. *Nat'l Fed'n of the Blind of Ark., Inc. v. Pryor*, 258 F.3d 851 (8th Cir. 2001).

Subsection (a)(2) of this section does not violate the equal protection clause of the Fourteenth Amendment to the federal constitution, notwithstanding the contention that it unreasonably discriminates between small charities that must combine their advocacy and solicitation calls and large charities that can make separate calls and thereby exercise their advocacy free speech rights unencumbered by the statute's prohibition, since advocacy callers and those soliciting contributions are not similarly situated and the state's decision to distinguish between them was not shown to be irrational. *Nat'l Fed'n of the Blind of Ark., Inc. v. Pryor*, 258 F.3d 851 (8th Cir. 2001).

### **4-99-202. Collection practices.**

(a)(1) No person who calls a residential telephone number for the purpose of offering merchandise for sale shall dispatch a courier or other individual to the residence to collect payment before the consumer has inspected the merchandise.

(2) It shall be unlawful for any person who calls a residential telephone number for the purpose of offering a prize to a consumer to dispatch a courier or other individual to the consumer's home for the purpose of collecting any fees or costs of any kind from the consumer.

(b) A violation of this section shall be a Class A misdemeanor.

(c)(1) A violation of the provisions of this section shall constitute an unfair and deceptive act or practice as defined by the Deceptive Trade Practices Act, § 4-88-101 et seq.

(2) All remedies, penalties, and authority granted to the Attorney General under the Deceptive Trade Practices Act, § 4-88-101 et seq., shall be available to the Attorney General for the enforcement of this section.

(d) Nothing in this section limits the rights or remedies which are otherwise available to the consumer under any other law.

(e) The obligations under this section are cumulative and should in no way be deemed to limit the obligations imposed under any other law.

**History.** Acts 1999, No. 566, § 1.

#### **4-99-203. Consumer's express written authorization required.**

(a)(1) For the purposes of this section, "telemarketer" means any person who initiates telephone calls to, or who receives telephone calls from, a consumer in connection with a plan, program, or campaign to market goods and services.

(2) The term "telemarketer" does not include a federally insured depository institution or its subsidiary when it obtains or submits for payment a check, draft, or other form of negotiable instrument drawn on or debited against a person's checking, savings, share, or other depository account at that institution.

(b)(1) It shall be unlawful for any telemarketer as defined in subsection (a) of this section to obtain or submit for payment a check, draft, or other form of negotiable instrument drawn on a person's checking, savings, share, or other depository account without the consumer's express written authorization.

(2) For the purpose of this section, a check bearing the valid signature of the consumer shall constitute the consumer's express written authorization.

(c)(1) A violation of the provisions of this section shall constitute an unfair and deceptive act or practice as defined by the Deceptive Trade Practices Act, § 4-88-101 et seq.

(2) All remedies, penalties, and authority granted to the Attorney General under the Deceptive Trade Practices Act, § 4-88-101 et seq., shall be available to the Attorney General for the enforcement of this section.

(d) Nothing in this section limits the rights or remedies which are otherwise available to a consumer under any other law.

(e) The obligations under this section are cumulative and should in no way be deemed to limit the obligations under any other law.

**History.** Acts 1999, No. 1512, § 1.

### **SUBCHAPTER 3 — CALLER IDENTIFICATION BLOCKING BY TELEPHONIC SELLERS**

**SECTION.**

4-99-301. Definitions.

4-99-302. Prohibition.

**SECTION.**

4-99-303. Penalties — Remedies — Enforcement.

#### **4-99-301. Definitions.**

For the purpose of this subchapter:

(1) “Caller identification service” means a service offered by a telecommunications utility that provides caller identification information to a device capable of displaying the information;

(2) “Charitable organization” means any charitable organization as that term is defined by § 4-28-401(1);

(3) “Consumer” means any person to whom has been assigned in the State of Arkansas any telephone line and corresponding telephone number;

(4) “Per call blocking” means a telecommunications service that prevents the transmission of caller identification information to a called party on an individual call if the calling party acts affirmatively to prevent the transmission of the caller identification information;

(5) “Per line blocking” means a telecommunications service that prevents the transmission of caller identification to a called party on every call unless the calling party acts affirmatively to release the caller identification information;

(6) “Person” means any individual, group, unincorporated association, limited or general partnership, limited liability corporation, corporation, professional fund raiser, charitable organization, or other business entity; and

(7) “Telephone solicitation” means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of or investment in property, goods, or services or the initiation of a telephone call or message for the purpose of encouraging a charitable contribution by or on behalf of any charitable organization, which telephone call or message is transmitted to any consumer.

**History.** Acts 1999, No. 1361, § 1.

#### **4-99-302. Prohibition.**

(a) It is a violation of this subchapter for any person to make or transmit a telephone solicitation while using any method, including, but not limited to, per call blocking or per line blocking, that prevents caller identification information for the telephone solicitor’s lines used to make telephone calls to a consumer from being shown by a device capable of displaying caller identification information.

(b)(1) It is a violation of this subchapter for any person making or transmitting a telephone solicitation by any method to display or cause to be displayed a fictitious or misleading name or telephone number on an Arkansas resident’s telephone caller identification service.

(2) Subdivision (b)(1) of this section does not apply to the transmission of caller identification service by a telecommunications provider.

**History.** Acts 1999, No. 1361, § 1; 2003, No. 1465, § 6.

**RESEARCH REFERENCES**

**U. Ark. Little Rock L. Rev.** Survey of assembly, Business Law, 26 U. Ark. Little Rock L. Rev. 351.

**4-99-303. Penalties — Remedies — Enforcement.**

(a) When a person violates this subchapter or a regulation prescribed under this subchapter, the violation shall constitute an unfair or deceptive act or practice as defined in § 4-88-101 et seq. pertaining to deceptive trade practices.

(b)(1) All remedies, penalties, and authority granted to the Attorney General under § 4-88-101 et seq. shall be available to the Attorney General for enforcement of this subchapter.

(2) The remedies and penalties provided by this section are cumulative to each other and the remedies or penalties available under all other laws of this state.

**History.** Acts 1999, No. 1361, § 1.

**SUBCHAPTER 4 — ARKANSAS CONSUMER TELEPHONE PRIVACY ACT**

SECTION.	SECTION.
4-99-401. Short title.	4-99-406. Applicability of subchapter.
4-99-402. Legislative findings and intent.	4-99-407. Enforcement by the Attorney General.
4-99-403. Definitions.	4-99-408. Moneys derived from listing charge.
4-99-404. Statewide database.	
4-99-405. Prohibitions.	

**4-99-401. Short title.**

This subchapter shall be known as the “Arkansas Consumer Telephone Privacy Act”.

**History.** Acts 1999, No. 1465, § 1.

**4-99-402. Legislative findings and intent.**

(a) The General Assembly finds that:

(1) The use of the telephone to market goods and services to the home and to other businesses is now pervasive due to the increased use of cost-effective telemarketing techniques;

(2) Unrestricted telemarketing, however, can be an intrusive invasion of privacy;

(3) Many consumers are outraged over the proliferation of intrusive nuisance calls to their homes from telemarketers;

(4) In addition, the proliferation of unsolicited telemarketing calls, especially during the evening hours, creates a disturbance upon the home and family life of Arkansas consumers during a time of day used by many families for traditional family activities;

(5) In addition, some consumers maintain telephone service primarily for emergency medical situations, and unrestricted telemarketing calls to these consumers may create a health and safety risk for these consumers;

(6) Individuals' privacy rights, public safety interests, and commercial freedom of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices; and

(7)(A)(i) Many consumers enjoy and benefit from unsolicited telemarketing contacts from legitimate telemarketers.

(ii) However, other consumers object to these contacts as an invasion of an individual's right of privacy and have expressed an intention to refuse to respond to such telemarketing contacts.

(B) Thus, even legitimate telemarketers have no further legitimate interest in continuing to invade the privacy of those consumers who have affirmatively expressed their objections to such contact and, in fact, legitimate telemarketers can make their telemarketing efforts even more cost-effective by avoiding calling those consumers who have affirmatively expressed an objection to any such contact.

(b) The General Assembly intends that this subchapter protect the privacy of Arkansas consumers who have affirmatively expressed an objection to unsolicited telephone solicitations, and the General Assembly intends that this subchapter be liberally construed to effectuate that goal.

**History.** Acts 1999, No. 1465, § 2.

#### **4-99-403. Definitions.**

As used in this subchapter, unless the context requires otherwise:

(1) The term "affiliates" means a person or persons wholly owned and operated by a parent entity, which parent entity claims a prior or existing business relationship with a consumer or a parent company whose wholly owned subsidiary claims a prior existing business relationship with the consumer;

(2)(A) The term "charitable organization" means:

(i) Any person who is or holds himself out to be established for any benevolent, educational, philanthropic, humane, scientific, patriotic, social welfare or advocacy, public health, environmental conservation, civic, or other eleemosynary purpose or for the benefit of law

enforcement personnel, firefighters, or other persons who protect the public safety; or

(ii) Any person who in any manner employs a charitable appeal as the basis of any solicitation or an appeal which has a tendency to suggest there is a charitable purpose to any such solicitation.

(B) However, it does not include those charitable organizations that are not required to register with the Attorney General's office pursuant to those statutes governing the solicitation of charitable contributions;

(3) The term "consumer" means any person to whom has been assigned in the State of Arkansas any residential telephone line and corresponding telephone number;

(4) The term "person" means any individual, group, unincorporated association, limited or general partnership, limited liability corporation, corporation, professional fund raiser, charitable organization, or other business entity;

(5)(A) The term "prior or existing business relationship" means a relationship in which some financial transaction has transpired between the consumer and the telephone solicitor or its affiliates within the thirty-six (36) months immediately preceding the contemplated telephone solicitation.

(B) The term does not include the situation wherein the consumer has merely been subject to a telephone solicitation by or at the behest of the telephone solicitor within the thirty-six (36) months immediately preceding the contemplated telephone solicitation; and

(6)(A) The term "telephone solicitation" means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of or investment in property, goods, or services, or the initiation of a telephone call or message for the purpose of encouraging a charitable contribution by or on behalf of any charitable organization, which telephone call or message is transmitted to any consumer, but such term does not include a call or message to any person made with that person's prior written express invitation or permission nor a call or message to any consumer with whom the telephone solicitor has a prior or existing business relationship.

(B) Also, such term does not include a telephone call by any person to a consumer who has placed upon his or her real property a "for sale" sign which lists a telephone number and invites inquiries regarding the property.

(C) Also, such term does not include a telephone call made solely in connection with an existing debt or contractual obligation, payment or performance of which has not been completed at the time of the call.

**4-99-404. Statewide database.**

The Attorney General shall:

(1) Establish and thereafter operate a single statewide database composed of a list of telephone numbers of consumers who object to receiving telephone solicitations;

(2)(A) Specify the methods by which the objections to telephone solicitations shall be collected and added to the database.

(B)(i) Any consumer wishing to be placed in the database may notify the Attorney General and be placed in the database upon receipt by the Attorney General of an application and any initial listing charge which shall not exceed ten dollars (\$10.00).

(ii) The listing shall be renewed by the Attorney General annually for each consumer upon the receipt of a renewal notice and any annual assessment not to exceed five dollars (\$5.00).

(C)(i) The database may include Arkansas consumers who have registered for the national "Do-Not-Call" registry established and maintained by the Federal Trade Commission pursuant to 16 C.F.R. § 310.4, as in effect on March 1, 2003.

(ii) The Attorney General may:

(a) Periodically obtain from the commission the information necessary to add these Arkansas consumers to the database maintained by the Attorney General; and

(b) Provide to the commission access to the state database so that those Arkansas consumers who have signed up for the state database can also be included in the national Do-Not-Call registry;

(3) Specify the methods, if any, by which the objections may be withdrawn from the database;

(4) Specify the methods by which any person desiring to make or transmit telephone solicitations may obtain access to the database as required to avoid calling the telephone numbers of the consumers included in the database;

(5) Specify the methods, if any, for recovering the costs involved in identifying, collecting, updating, and disseminating the database and for other activities related to the Attorney General's duties under this subchapter; and

(6) Specify the frequency with which the database will be updated and specify the method by which the updating will take effect for the purposes of compliance with this subchapter, allowing no fewer than ten (10) calendar days for affected persons to update their databases after the Attorney General's database has been updated.

**History.** Acts 1999, No. 1465, § 4; tion began: "No later than January 1, 2003, No. 1042, § 1. 2000."

**A.C.R.C. Notes.** As enacted, this sec-

**4-99-405. Prohibitions.**

It shall be a violation of this subchapter for any person to:

(1) Make or transmit a telephone solicitation to the telephone number of any consumer included in the then-current database maintained by the Attorney General pursuant to this subchapter;

(2) Make or transmit a telephone solicitation without having first accessed, in the manner specified by the Attorney General, the then-current database maintained by the Attorney General pursuant to this subchapter; or

(3) Make or transmit a telephone solicitation if that telephone solicitation violates the Federal Trade Commission Do-Not-Call rule set out in 16 C.F.R. § 310.4, as in effect on March 1, 2003.

**History.** Acts 1999, No. 1465, § 5;  
2003, No. 1042, § 2.

**4-99-406. Applicability of subchapter.**

The provisions of this subchapter shall not apply to:

(1) Any person who is a licensee, as defined by § 17-42-103(7)(A), who is a resident of the State of Arkansas and whose telephone call to the consumer is for the sole purpose of selling, exchanging, purchasing, renting, listing for sale or rent, or leasing real estate in accordance with the provisions for which he or she was licensed and not in conjunction with any other offer;

(2) Any motor vehicle dealer, as that term is defined in § 23-112-103(19), who is a resident of the State of Arkansas, and who maintains a current motor vehicle dealer's license issued by the Arkansas Motor Vehicle Commission, whose call to the consumer is for the sole purpose of selling, offering to sell, soliciting, or advertising the sale of motor vehicles in accordance with the provisions for which they were licensed and not in conjunction with any other offer;

(3) Any agent, as that term is defined in § 23-64-102(1), who maintains a current license as an insurance agent whose call to the consumer is for the purpose of soliciting, consulting, advising, or adjusting in the business of insurance;

(4) Any broker-dealer, agent, or investment advisor registered by the Securities Commissioner pursuant to the provisions of § 23-42-301 et seq., whose telephone call to the consumer is for the purpose of effecting or attempting to effect the purchase or sale of securities or has the purpose of providing or seeking to provide investment or financial advice;

(5) Any person calling on behalf of a charitable organization as that term is defined in § 4-99-403(2), whose call to the consumer is for the sole purpose of soliciting for the charitable organization and who receives no compensation as a result of his or her solicitation activities on behalf of the charitable organization;

(6) Any person calling on behalf of a newspaper of general circulation whose call to the consumer is for the purpose of soliciting a subscription

to the newspaper from the consumer or soliciting advertising from the consumer;

(7)(A) Telephone calls made on behalf of any federally chartered or state-chartered bank if the call to the consumer relates to banking services other than credit card offers.

(B) In no event shall the telephone calls made pursuant to this subdivision (7) of this section reference any form of credit card offer; and

(8) Telephone calls made on behalf of a funeral establishment properly licensed pursuant to § 17-29-301 et seq., if the purpose of the telephone call relates to services provided by the funeral establishment in its ordinary course of business.

**History.** Acts 1999, No. 1465, § 6.

#### **4-99-407. Enforcement by the Attorney General.**

(a) Any violation by any person of the prohibitions set out in § 4-99-405 shall constitute an unfair or deceptive act or practice as defined by § 4-88-101 et seq. of the Deceptive Trade Practices Act.

(b) All authority granted to the Attorney General and all remedies available to the Attorney General under the Deceptive Trade Practices Act, § 4-88-101 et seq., shall be granted to and available to the Attorney General for the enforcement of this subchapter after the time period referred to in § 4-99-404(6) has been provided for affected persons to update their databases.

**History.** Acts 1999, No. 1465, § 7.

#### **4-99-408. Moneys derived from listing charge.**

All moneys derived from the listing charge described in § 4-99-404 shall be deposited into the State Treasury to the credit of the State Central Services Fund as a direct revenue to be used exclusively to defray the cost associated with the creation and maintenance of the database required by this subchapter and the enforcement of this subchapter.

**History.** Acts 1999, No. 1465, § 8.

## **CHAPTER 100**

### **MOTOR VEHICLE TRANSFERS**

#### **SECTION.**

4-100-101. Definitions.

4-100-102. Remedies and penalties.

#### **SECTION.**

4-100-103. Prohibited practices.

**4-100-101. Definitions.**

As used in this subchapter, unless the context requires otherwise:

(1) "Lease" means the grant of use and possession of a motor vehicle for consideration, whether or not the grant includes an option to buy the vehicle;

(2) "Motor vehicle" means a device in, on, or by which a person or property is or may be transported or drawn on a highway, except a device used exclusively on stationary rails or tracks;

(3) "Security interest" means an interest in personal property or fixtures that secures payment or performance of an obligation;

(4) "Third party" means a person other than the actor or the owner of the vehicle; and

(5) "Transfer" means to transfer possession, whether or not another right is also transferred, by means of a sale, lease, sublease, lease assignment, or other property transfer.

**History.** Acts 1993, No. 1042, § 1.

**4-100-102. Remedies and penalties.**

(a) Any sublease or transfer, or attempted sublease or transfer, in violation of this subchapter shall constitute a deceptive trade practice as defined by § 4-88-101 et seq., and any and all remedies available thereto shall be available to the Attorney General for the enforcement of this subchapter.

(b) Any person injured or damaged by reason of any act in violation of this subchapter may file a civil action to recover damages based on the violation with the following remedies:

(1) The greater of three (3) times the amount of any actual damages or one thousand five hundred dollars (\$1,500);

(2) Reasonable attorney's fees and costs; and

(3) Any other relief which the court deems just.

(c) A person who knowingly or intentionally engages in an act of unlawful subleasing or transfer of a motor vehicle as described by this subchapter shall be guilty of a Class D felony.

**History.** Acts 1993, No. 1042, § 3.

**4-100-103. Prohibited practices.**

(a) A person engages in an act of unlawful subleasing or transfer of a motor vehicle if all of the following conditions are met:

(1) The vehicle is subject to a lease contract, an installment sales agreement, or a security agreement, the terms of which prohibit the transfer or assignment of any right or interest in the vehicle or under the lease contract, installment sales agreement, or security agreement without consent of the lessor, seller, or secured party;

(2) The person is not a party to the lease contract, installment sales agreement, or security agreement;

(3) The person transfers or assigns, or purports to transfer or assign, a right or an interest in the vehicle to a person who is not a party to the lease contract, installment sales agreement, or security agreement;

(4) The person does not obtain, before the transfer or assignment described in subdivision (a)(3) of this section, written consent to the transfer or assignment from the vehicle's lessor, seller, or secured party; and

(5) The person receives compensation or some other consideration for the transfer or assignment described in subdivision (a)(3) of this section.

(b) A person engages in an act of unlawful subleasing or transfer of a motor vehicle when the person is not a party to the lease contract, installment sales agreement, or security agreement and assists, causes, or arranges an actual or purported transfer or assignment described as a violation of this subchapter.

(c) It is not a defense to prosecution under this subchapter that the motor vehicle's owner has violated a contract creating a security interest, lease, or lien in the motor vehicle.

**History.** Acts 1993, No. 1042, § 2.

## CHAPTER 101

### JEWELRY

#### SUBCHAPTER.

1. GENERAL PROVISIONS. [RESERVED.]
2. SALE OF FRACTURE-FILLED AND CLARITY-ENHANCED DIAMONDS.

#### SUBCHAPTER 1 — GENERAL PROVISIONS

[Reserved]

#### SUBCHAPTER 2 — SALE OF FRACTURE-FILLED AND CLARITY-ENHANCED DIAMONDS

#### SECTION.

4-101-201. Duty of merchant — Penalty.

#### 4-101-201. Duty of merchant — Penalty.

(a) A person engaged in the business of selling fracture-filled or clarity-enhanced diamonds or jewelry containing fracture-filled diamonds shall:

(1) Disclose to the customer that the diamond has been treated and that it is a fracture-filled or clarity-enhanced diamond; and

(2) Post the following notice in a conspicuous place at the entrance to the premises:

**“NOTICE TO CUSTOMERS.**

Fracture-filled and clarity-enhanced diamonds are sold by this business. Arkansas law requires that the seller disclose to the customer that a diamond is fracture-filled or clarity-enhanced before the sale of any fracture-filled or clarity-enhanced diamond.”

(b) A violation of this section shall be a Class B misdemeanor.

**History.** Acts 1995, No. 1128, § 1.

## **CHAPTER 102**

### **PRIZE PROMOTION**

**SECTION.**

4-102-101. Legislative finding, declaration, and intent.

4-102-102. Definitions.

4-102-103. Violations.

4-102-104. Exemptions.

4-102-105. Prohibited practices.

**SECTION.**

4-102-106. Disclosures required.

4-102-107. Prize award required.

4-102-108. Telephonic prize offers.

4-102-109. Application of the Home Solicitation Act.

#### **4-102-101. Legislative finding, declaration, and intent.**

(a) The General Assembly has become aware of the avalanche of sweepstakes, contests, and prize promotions that have been and are being directed at Arkansas consumers and recognizes that consumers are often misled by these sweepstakes, contests, and prize promotions. The General Assembly also recognizes that Arkansas consumers have paid hundreds of thousands of dollars to sweepstakes, contests, and prize promoters based upon misrepresentations by those promoters to Arkansas consumers. Many of the sweepstakes, contests, and prize promotions are artfully crafted to lead Arkansas consumers to believe that they have been selected to receive valuable prizes, when such is not the case. The promotions often mislead Arkansas consumers as to the value of the prizes. The promotions often mislead Arkansas consumers as to their chances to receive the prize. The promotions often mislead Arkansas consumers to believe that they must purchase the promoter's product, or otherwise pay to the promoter sums of money in order to be eligible to receive the prize, or that the likelihood that the prize to be awarded will be increased, or that the consumer's application for the prize will receive special handling if the consumer purchases the promoter's product. These sweepstakes, contests, and prize promoters prey particularly upon elderly Arkansas consumers.

(b) It is the intent of the General Assembly through the enactment of this chapter to require that Arkansas consumers be provided with all relevant information necessary to make an informed decision concerning sweepstakes, contests, and prize promotions. It is also the intent of the General Assembly to prohibit misleading and deceptive prize promotions. This chapter shall be construed liberally in order to achieve this purpose.

**History.** Acts 1995, No. 736, § 9.

### CASE NOTES

**Applicability.**

The Prize Promotion Act did not apply to a golf tournament in which the sponsor advertised that a car would be awarded to the first person to score a hole-in-one as

the participants in the tournament were not required to purchase products in order to be eligible to win the car. *Burford Distrib., Inc. v. Starr*, 341 Ark. 914, 20 S.W.3d 363 (2000).

### RESEARCH REFERENCES

**Ark. L. Rev.** Priebe, *Arkansas Prize Promotion Act*, *Burford Distributing, Inc. v. Starr*, 341 Ark., 20 S.W.3d 363 (2000), 53 Ark. L. Rev. 749.

### 4-102-102. Definitions.

As used in this chapter, unless the context otherwise requires:

(1) "Prize" means a gift, award, or other item or service that is offered or awarded to a participant in a real or purported contest, competition, sweepstakes, puzzle, drawing, scheme, plan, or other selection process;

(2) "Retail value" of a prize means:

(A) A price at which the sponsor can substantiate that a substantial number of the prizes have been sold to the public in Arkansas in the preceding year; or

(B) If the sponsor is unable to satisfy the requirement in subdivision (2)(A) of this section, then no more than one and one-half (1.5) times the amount the sponsor paid for the prize in a bona fide purchase from an unaffiliated seller; and

(3) "Sponsor" means a corporation, partnership, limited liability company, sole proprietorship, or natural person that offers a prize or information about a prize to a person in Arkansas in conjunction with the sale or lease of any product or service, or offers a prize or information about a prize in conjunction with any real or purported contest, competition, sweepstakes, puzzle, drawing, scheme, plan, or other selection process that requires, or creates the reasonable impression of requiring, or allows the person to pay any money as a condition of receiving, or in conjunction with allowing the person to receive, use, compete for, or obtain a prize or information about a prize.

**History.** Acts 1995, No. 736, § 1; 2001, No. 1670, § 2.

### 4-102-103. Violations.

(a) Nothing in this chapter shall be construed to permit an activity otherwise prohibited by law.

(b)(1) Each prize offer made in violation of this chapter, as to each separate person to whom such offer is made, shall constitute a separate violation of this chapter.

(2)(A) A violation of this chapter is also a violation of the Deceptive Trade Practices Act, § 4-88-101 et seq., and is subject to all of the enforcement provisions of that act.

(B) For the purposes of the assessment of penalties pursuant to the Deceptive Trade Practices Act, § 4-88-101 et seq., each separate violation of this chapter will constitute a separate violation of the Deceptive Trade Practices Act, § 4-88-101 et seq.

(c)(1) Any person suffering a pecuniary loss because of an intentional violation of this chapter may bring an action in any court of competent jurisdiction and shall recover:

(A) Costs;

(B) Reasonable attorney's fees; and

(C) The greater of:

(i) Five hundred dollars (\$500); or

(ii) Twice the amount of the pecuniary loss.

(2) It is evidence of intent if the violation occurs after the office of the Attorney General has notified a sponsor that the sponsor is in violation of this chapter.

(d) The relief provided in this section is in addition to remedies or penalties otherwise available in regard to the same conduct under law or under other statutes of this state.

**History.** Acts 1995, No. 736, § 8.

#### **4-102-104. Exemptions.**

(a) Nothing in this chapter creates liability for the acts by the publisher, owner, agent, or employee of a newspaper, periodical, radio station, television station, cable television station system, or other advertising medium arising out of the publication or dissemination of a solicitation, notice, or promotion governed by this chapter, unless the publisher, owner, agent, or employee had knowledge that the solicitation, notice, or promotion violated the requirements of this chapter, or had a financial interest in the solicitation, notice, or promotion.

(b)(1) This chapter does not apply to sponsors of prize promotions where all prizes are awarded absolutely for free and there is no opportunity for the payment of money from the person to the sponsor or any agent of the sponsor.

(2) The fact that a prize promotion makes provision for entry into the contest or eligibility for the prize without any payment does not exempt the prize promotion or its sponsor from the provisions of this chapter where the prize promotion requires, or creates the reasonable impression of requiring, or allows the person to pay, any money as a condition of receiving, or in conjunction with allowing the person to receive, use, compete for, or obtain a prize or information about a prize.

(3) If the prize promotion provides any opportunity for any payment by the person to the sponsor for any reason, regardless of whether such payment is required, and regardless of how such payment is denominated, this exemption shall not apply.

(c) This chapter does not apply to solicitations or representations in connection with:

(1) The sale or purchase of books, recordings, videocassettes, periodicals, and similar goods through:

(A) A membership group or club which is regulated by the Federal Trade Commission pursuant to 16 C.F.R. Part 425.1 concerning the use of negative option plans by sellers in commerce; or

(B)(i) The sale or purchase of such goods through a contractual plan or arrangement such as a continuity plan, subscription arrangement, or a single sale or purchase series arrangement under which the seller ships such goods to a consumer who has consented in advance to receive the goods and, after the receipt of the goods, is given the opportunity to examine the goods and to receive a full refund of charges for the goods upon return of the goods undamaged within a reasonable period of time.

(ii) Provided, that the return and refund privilege shall be clearly and conspicuously disclosed to the consumer in the original contact with the consumer, whether oral or written.

(iii) If the consumer elects to return the product for a refund, the seller shall process the refund within thirty (30) days after the receipt of the returned merchandise by the consumer.

(iv) In addition to the return and refund privilege, the consumer may cancel the plan, arrangement, subscription, or purchase series at any time by notifying the seller. After the seller receives the cancellation notice, any further products, not already in transit, sent to the consumer shall be considered a gift to the consumer which the consumer may keep without further obligation, and for which gift the seller shall not bill the consumer; or

(2)(A) Sales by a catalogue seller.

(B) For purposes of this section, "catalogue seller" shall mean any entity and its subsidiaries, or person, at least fifty percent (50%) of whose annual revenues are derived from the sale of products sold in connection with the distribution of catalogues of at least twenty-four (24) pages, which contain written descriptions or illustrations and sale prices for each item of merchandise and which are distributed in more than one (1) state with a total annual distribution of at least two hundred fifty thousand (250,000).

(d) Any willful failure of a seller claiming exemption under subsection (c) of this section to comply with all of the terms of the exemption shall render a claim of exemption void, and such seller shall be bound to fully comply with the provisions of this chapter.

(e) This chapter does not apply to pari-mutuel wagering on horse racing and greyhound racing permitted and regulated by Arkansas law.

(f) This chapter does not apply to prize promotions that appear in a magazine, newspaper, or other periodical if the prize promotions are not directed to a named individual or if the prize promotions do not include an opportunity to make a payment or order a product or service.

(g) The solicitations or representations exempted from the coverage of this chapter in subsection (c) of this section shall be exempt only if:

(1) The information specified in § 4-102-106(b) is clearly and conspicuously set forth or contained in the rules for any solicitation which includes entry materials for a sweepstakes;

(2) The notification and steps to deliver a prize are commenced within thirty (30) days of a prize award; and

(3) A prize is not available, the sponsor complies with the provisions set out in § 4-102-107(1) or (2).

**History.** Acts 1995, No. 736, § 6; 2001, § 23-110-101 et seq.  
No. 1670, § 1.

Dog racing, § 23-111-101 et seq.

**Cross References.** Horse racing,

#### **4-102-105. Prohibited practices.**

A sponsor shall not do any of the following:

(1) Offer a prize to any person except in accordance with the requirements of this chapter;

(2)(A) Deliver a written prize notice, or an envelope containing a written prize notice that contains language or is designed in a manner that would have the tendency or capacity to mislead intended recipients as to the source of the written prize notice.

(B) This prohibition includes, but is not limited to, a written prize notice or envelope which indicates that the notice or envelope originates from a government agency, public utility, insurance company, consumer reporting agency, debt collector, or law firm, unless the written prize notice or envelope originates from that source;

(3) Represent directly or by implication that the number of persons eligible for the prize is limited or that a person has been selected to receive a particular prize unless the representation is true;

(4) Represent that a person is a winner or finalist, has been specially selected, is in first place, or is otherwise among a limited group of persons with an enhanced likelihood of receiving a prize, or that a person is entering a contest, sweepstakes, drawing, or other competitive enterprise from which a single winner or select group of winners will receive a prize, when in fact the enterprise is a promotional scheme designed to make contact with prospective customers and all or a substantial number of those receiving the notice are awarded the same prize;

(5)(A) Represent directly or by implication that a person will have an increased chance of receiving a prize by making multiple or duplicate purchases, payments, or donations, or by entering a game, drawing, sweepstakes, or other contest more than one (1) time, unless the representation is true.

(B) A sponsor is deemed to have made such representation if the sponsor delivers one (1) or more prize notices to a person after the person has already made a purchase, payment, or donation to the sponsor for the same promotion, or has already entered the same game, drawing, sweepstakes, or other contest, unless the sponsor can demonstrate a bona fide error even though the sponsor has implemented procedures reasonably designed to prevent such duplication;

(6) Represent directly or by implication that a person is being notified a second or final time of the opportunity to receive or compete for a prize unless the representation is true;

(7) Represent directly or by implication that a prize notice is urgent, or otherwise convey an impression of the urgency by use of description, narrative copy, phrasing on an envelope, or similar method unless there is a limited time period in which the recipient must take some action to claim or be eligible to receive a prize, and the date by which such action is required appears in immediate proximity to each representation of urgency and in the same type size and boldness as each representation of urgency;

(8)(A) Knowingly sell, rent, exchange, transfer, or otherwise furnish to or purchase from other persons, financial data regarding Arkansans disclosed in connection with a prize promotion not in compliance with this chapter.

(B) For purposes of this chapter, financial data includes credit card numbers, bank account numbers, other payment device numbers, and dollars spent on prize promotions which are not in compliance with this chapter; or

(9) Request an individual to disclose the individual's phone number, age, birthdate, credit card ownership, or financial data in connection with a prize promotion which is not in compliance with this chapter.

**History.** Acts 1995, No. 736, § 7.

#### **4-102-106. Disclosures required.**

(a) No sponsor shall offer a prize nor shall a sponsor use any solicitation, whether written or oral, and however communicated, that offers a prize, unless the person to whom such offer is made has first received a written prize notice containing the information required in subsections (b) and (c) of this section.

(b) A written prize notice must contain each of the following:

(1) The true name or names of the sponsor and the address of the sponsor's actual principal place of business;

(2) The retail value of each prize the person receiving the notice has been selected to receive or may be eligible to receive;

(3) A statement of the person's odds of receiving each prize identified in the notice;

(4) Any requirement that the person pay shipping or handling fees or any other charges in order to obtain or use a prize, or any fees required to obtain information about a prize, including the nature and amount of such charges;

(5) If the receipt of the prize is subject to a restriction, a statement that a restriction applies, and a description of the restrictions;

(6) Any limitations on eligibility for the prize; and

(7) If a sponsor represents that the person is a "winner", is a "finalist", has been "specially selected", is in "first place", or is otherwise among a limited group of persons with an enhanced likelihood of

receiving a prize, the written prize notice must contain a statement of the maximum number of persons in the group or purported group with this enhanced likelihood of receiving a prize.

(c) The information required by subsection (b) of this section must be presented in the following form:

(1) The retail value and statement of odds required under subdivisions (b)(2) and (3) of this section must be stated in immediate proximity to each identification of a prize on the written notice, and must be in the same size and boldness of type as the reference to the prize;

(2) The statement of odds must include, for each prize, the total number of prizes to be given away and the total number of written prizes to be distributed;

(3) The number of prizes and written prize notices must be stated in arabic numerals;

(4) The statement of odds must be in the following form: "... (number of prizes) out of .... (notices distributed)";

(5) If a person is required to pay shipping or handling fees or any other charges in order to obtain a prize, to be eligible to obtain a prize, to obtain information about a prize, or to otherwise participate in the contest, the following statement must appear in immediate proximity to each listing of the prize in the written prize notice, in not less than 10-point bold face type: "YOU MUST PAY \$ .... TO RECEIVE THIS ITEM" or "YOU MUST PAY \$ .... TO COMPETE FOR THIS ITEM" or "YOU MUST PAY \$ .... TO OBTAIN INFORMATION ABOUT THIS ITEM", whichever is applicable; and

(6) A statement required under subdivision (b)(7) of this section must appear in immediate proximity to each representation that the person is among a group of persons with an enhanced likelihood of receiving a prize and must be in the same size and boldness of type as the representation.

**History.** Acts 1995, No. 736, § 2.

## CASE NOTES

### ANALYSIS

Contractual Relationship.  
Posting of Notice.  
Notice Adequate.  
Written Prize Notice.

### Contractual Relationship.

This section does not define the contractual relationship between the participating parties, therefore, the official rules serve as the controlling contract. Without possession of a valid game-stamp, the plaintiff was unable to perform the unilateral contract, and this lack of compliance

resulted in no contract, no duty to perform by the defendants, and no breach. *Barnes v. McDonald's Corp.*, 72 F. Supp. 2d 1038 (E.D. Ark. 1999), *aff'd*, 230 F.3d 1362 (8th Cir. Ark. 2000).

### Posting of Notice.

Placing the rules and restrictions for the game openly in the exact building where the prize stamps were being given away put all participants on notice that there were rules and restrictions. *Barnes v. McDonald's Corp.*, 72 F. Supp. 2d 1038 (E.D. Ark. 1999), *aff'd*, 230 F.3d 1362 (8th Cir. Ark. 2000).

**Notice Adequate.**

Plaintiff had adequate notice of game restrictions where games boards were widely dispersed to the public by an advertising circular, were placed in a large number of Sunday newspapers, were available at defendant stores to be picked up by anyone interested in playing, and where plaintiff had actual possession of a game board. *Barnes v. McDonald's Corp.*, 72 F. Supp. 2d 1038 (E.D. Ark. 1999), *aff'd*, 230 F.3d 1362 (8th Cir. Ark. 2000).

found in Official Rules openly posted within a participating restaurant, and these posted rules served as a fundamental part of a written prize notice, especially in light of the references made to these rules on the Game Board and the Redemption Form. *Barnes v. McDonald's Corp.*, 72 F. Supp. 2d 1038 (E.D. Ark. 1999), *aff'd*, 230 F.3d 1362 (8th Cir. Ark. 2000).

**Written Prize Notice.**

All of the information required under subsections (b) and (c) of this section was

**4-102-107. Prize award required.**

A sponsor who represents to a person that the person has been awarded a prize shall, not later than thirty (30) days after making a representation, provide the person with the prize, or with a voucher, certificate, or other document giving the person the unconditional right to receive the prize, or shall provide the person with either of the following items selected by the person:

- (1) Any other prize listed in the written prize notice that is available and that is of equal or greater value; or
- (2) The retail value of the prize as stated in the written notice in the form of cash, a money order, or a certified check.

**History.** Acts 1995, No. 736, § 3.

**4-102-108. Telephonic prize offers.**

(a) All provisions of this chapter apply to prize offers made by way of telephone communication.

(b) Sponsors of the offers shall not solicit or accept the payment of any money from any person unless that person has first received the written prize notice as required by this chapter.

(c) No sponsor shall solicit or utilize in any fashion any credit card or bank account information from any person unless that person has first received a written prize notice as required by this chapter.

(d) If a sponsor contacts a person by telephone after that person has first received a written prize notice as required by this chapter, the sponsor shall specifically identify the written prize notice and shall by oral disclosure communicate all disclosures required by § 4-102-106 prior to soliciting or accepting any money from any person and prior to soliciting or accepting any credit card or bank account information from any person.

**History.** Acts 1995, No. 736, § 4.

**4-102-109. Application of the Home Solicitation Act.**

All prize offers, including telephone prize offers, in which the sponsor has initiated contact, regardless of his or her location, and the consumer's agreement to pay is made at the consumer's home and is an agreement to pay more than twenty-five dollars (\$25.00) is a home solicitation sale within the meaning of § 4-89-102(4).

**History.** Acts 1995, No. 736, § 5.

**Cross References.** Home Solicitation Act, § 4-89-101 et seq.

## CHAPTER 103

### CHARITABLE SOLICITATION

SUBCHAPTER.

1. GENERAL PROVISIONS. [RESERVED.]
2. CONTAINERS.

#### SUBCHAPTER 1 — GENERAL PROVISIONS

[Reserved]

#### SUBCHAPTER 2 — CONTAINERS

SECTION.

4-103-201. Definitions.

4-103-202. Disclosure label required —  
Unlawful charitable solicitation.

SECTION.

4-103-203. Exemptions.

4-103-204. Enforcement of subchapter.

4-103-205. Construction of subchapter.

**4-103-201. Definitions.**

As used in this subchapter:

(1)(A) "Charitable organization" means any nonprofit corporation that is or holds itself out to be established for a charitable purpose or any person who employs a charitable appeal as the basis for any solicitation or appeal that suggests, directly or indirectly, that the solicitation is for a charitable purpose.

(B) "Charitable organization" includes a person, chapter, branch, area office, or a similar affiliate or agent of any of these, whether paid or not paid, soliciting contributions within the state for a charitable organization or cause;

(2) "Charitable purpose" means any charitable, benevolent, philanthropic, humane, patriotic, scientific, artistic, public health, social welfare, advocacy, environmental, conservation, civic, or other eleemosynary purpose as defined and amended, from time to time, by the Internal Revenue Code;

(3) "Container" means any box, carton, package, receptacle, canister, jar, dispenser, or machine that offers a product for sale or distribution for solicitation purposes; and

(4) "Disclosure label" means a printed or typed notice affixed to a container located in a conspicuous place and accessible to the public which is easily readable and legible and informs the public of the following:

(A) The approximate annual percentage paid, if any, to an individual or organization to maintain, service, or collect the contributions raised by the solicitation;

(B) The net percentage or sum for the most recent calendar year going to the specific charitable purpose; and

(C) If the maintenance, service, and collection from the container is done by volunteers or by paid individuals.

**History.** Acts 1997, No. 172, § 1.

Code, referred to in (2), is codified gener-

**U.S. Code.** The Internal Revenue      ally as 26 U.S.C. § 1 et seq.

#### **4-103-202. Disclosure label required — Unlawful charitable solicitation.**

(a) Any container used by any charitable organization in a public place to solicit contributions by offering a product for sale or distribution for solicitation purposes shall have a disclosure label attached to it.

(b) Any charitable organization that knowingly places a container in violation of the provisions of subsection (a) of this section commits the offense of unlawful charitable solicitation.

(c) Unlawful charitable solicitation is a Class C misdemeanor.

(d) It is an affirmative defense to prosecution under this section that a charitable organization has given one hundred percent (100%) of the receipts generated by the container to the charitable purpose for which the charitable organization represented the funds were being solicited.

**History.** Acts 1997, No. 172, § 2.

#### **4-103-203. Exemptions.**

No charitable organization shall be liable for prosecution under this subchapter for failure to place a disclosure label on any container if:

(1) The container generates less than one hundred dollars (\$100) gross per annum; or

(2) The charitable organization generates less than five hundred dollars (\$500) per year from all sources for any charitable purpose or purposes combined.

**History.** Acts 1997, No. 172, § 3.

#### **4-103-204. Enforcement of subchapter.**

(a)(1) Any violation of the provisions of this subchapter shall constitute an unfair and deceptive act or practice as defined by the Deceptive Trade Practices Act, § 4-88-101 et seq.

(2) All remedies, penalties, and authority granted to the Attorney General under the Deceptive Trade Practices Act, § 4-88-101 et seq.,

shall be available to the Attorney General for the enforcement of this subchapter.

(b) The prosecuting attorneys of the various districts and counties of this state shall also have full authority to enforce the provisions of this subchapter.

**History.** Acts 1997, No. 172, § 4.

#### **4-103-205. Construction of subchapter.**

The provisions of this subchapter shall be supplemental to the laws of this state pertaining to charitable fraud or fraudulent practices.

**History.** Acts 1997, No. 172, § 5.

## **CHAPTER 104**

### **CREDIT CARD SOLICITATION**

#### **SUBCHAPTER.**

1. GENERAL PROVISIONS. [RESERVED.]
2. COLLEGE CAMPUSES.

#### **SUBCHAPTER 1 — GENERAL PROVISIONS**

[Reserved]

#### **SUBCHAPTER 2 — COLLEGE CAMPUSES**

#### **SECTION.**

- 4-104-201. Definitions.  
4-104-202. Face-to-face solicitations.  
4-104-203. Solicitations at athletic events.

#### **SECTION.**

- 4-104-204. Violations — Penalties.

#### **4-104-201. Definitions.**

As used in this subchapter:

(1) "Credit card" means:

(A) Any card, plate, or other single credit device that may be used from time to time to obtain credit.

(B) Checks and similar instruments that can be used only once to obtain a single credit extension are not credit cards;

(2) "Credit card issuer" means:

(A) Any person or entity who issues a credit card; or

(B) The employee or agent of the person or entity, with respect to the card;

(3) "Institution of higher education" means any public or private university, college, technical college, or community college located in Arkansas; and

(4) "Person" means any natural person, firm, association, organization, partnership, corporation, or company, or any combination thereof.

**History.** Acts 1999, No. 1328, § 1.

#### **4-104-202. Face-to-face solicitations.**

(a)(1) It is unlawful to:

(A) Solicit any person to apply for a credit card in an academic building and within one hundred feet (100') of an academic building on the campus of an institution of higher education; or

(B) Offer gifts or any other promotional incentives to any person under twenty-one (21) years of age through direct face-to-face contact in order to entice the person to apply for a credit card.

(2) Prior to any personal solicitation of credit card applications on the campus of an institution of higher education in which gifts or any other promotional incentives are being offered, the credit card issuer shall verify the identity and age of the person to be solicited by the review of a valid driver's license or other credible means of identification bearing a photograph of the person.

(3) This subsection shall not apply to the solicitation of a credit card application by a bank or credit union located on the campus if the solicitation is made within its office.

(b) It is unlawful to issue a credit card to any individual whose application for credit is obtained as a result of actions prohibited by this subchapter.

**History.** Acts 1999, No. 1328, § 2;  
2005, No. 1430, § 1.

#### **4-104-203. Solicitations at athletic events.**

If the institution of higher learning permits solicitations at athletic events, the institution shall include a credit seminar within the institution's freshman orientation.

**History.** Acts 1999, No. 1328, § 3.

#### **4-104-204. Violations — Penalties.**

Any credit card issuer violating this subchapter shall be guilty of a violation and fined not less than five hundred dollars (\$500) nor more than one thousand dollars (\$1,000) for each violation.

**History.** Acts 1999, No. 1328, § 4;  
2005, No. 1994, § 43.

## **CHAPTER 105**

## **LEMON LAWS**

### **SUBCHAPTER.**

1. GENERAL PROVISIONS. [RESERVED.]
2. ASSISTIVE DEVICES.

## RESEARCH REFERENCES

**ALR.** Validity, construction, and effect of state motor vehicle warranty legislation (lemon laws). 51 A.L.R.4th 872.

Constitutional right to jury trial in cause of action under state unfair or deceptive trade practices law. 54 A.L.R.5th

631.

Award of attorneys' fees under state motor vehicle warranty legislation (lemon laws). 82 A.L.R.5th 501.

## SUBCHAPTER 1 — GENERAL PROVISIONS

[Reserved]

## SUBCHAPTER 2 — ASSISTIVE DEVICES

### SECTION.

4-105-201. Definitions.

4-105-202. Express warranties.

4-105-203. Warranty.

### SECTION.

4-105-204. Repair.

4-105-205. Valuation.

4-105-206. Refund or replacement.

### 4-105-201. Definitions.

For purposes of this subchapter:

(1)(A) "Assistive device" means a:

(i) Manual wheelchair;

(ii) Motorized wheelchair;

(iii) Motorized scooter designed to enhance the mobility of a disabled person; or

(iv) Van lift.

(B) "Assistive device" does not include a device having a value of less than seven hundred fifty dollars (\$750);

(2) "Assistive device dealer" means a person who is in the business of selling assistive devices;

(3) "Assistive device lessor" means a person who leases an assistive device to a consumer or who holds the lessor's rights under a written lease;

(4) "Assistive device warranty" means the warranty attached to assistive devices sold or leased by assistive device manufacturers or assistive device dealers;

(5) "Collateral costs" means expenses incurred by a consumer in connection with the repair of a nonconformity, including the costs of obtaining an alternative assistive device;

(6) "Consumer" means:

(A) The purchaser of an assistive device, if the assistive device was purchased from an assistive device dealer or manufacturer for purposes other than resale;

(B) A person to whom the assistive device is transferred for purposes other than resale if the transfer occurs before the expiration of an express warranty applicable to the assistive device;

(C) A person who may enforce the warranty; and

(D) A person who leases an assistive device from an assistive device lessor under a written lease;

(7) "Demonstrator" means an assistive device used primarily for the purpose of demonstration to the public;

(8)(A) "Early termination cost" means any expense or obligation that an assistive device lessor incurs as a result of both the termination of a written lease before the termination date set forth in that lease and the return of an assistive device to a manufacturer pursuant to the provisions of this subchapter.

(B) "Early termination cost" includes a penalty for prepayment under a finance arrangement;

(9)(A) "Early termination saving" means any expense or obligation that an assistive device lessor avoids as a result of both the termination of a written lease before the termination date set forth in that lease and the return of an assistive device to a manufacturer pursuant to the provisions of this subchapter.

(B) "Early termination saving" includes an interest charge that the assistive device lessor would have paid to finance the assistive device or, if the assistive device lessor does not finance the assistive device, the difference between the total amount for which the lease obligates the consumer during the period of the lease term remaining after the early termination and the present value of that amount at the date of the early termination;

(10) "Manufacturer" means a person who manufactures or assembles assistive devices and agents of that person, including an importer, a distributor, factory branch, distributor branch, and any warrantors of the manufacturer's assistive device, but does not include an assistive device dealer;

(11) "Nonconformity" means a condition or defect that substantially impairs the use, value, or safety of an assistive device and that is covered by an express warranty applicable to the assistive device or to a component of the assistive device, including, but not limited to, any piece or part or any premanufactured and assembled part by the manufacturer or employee that fails in use, but does not include:

(A) A condition of the device that is the result of abuse, neglect, or unauthorized modification or alteration of the assistive device by a consumer; or

(B) A condition of the device that is the result of normal use which may be resolved through a fitting adjustment, preventative maintenance, or proper care; and

(12) "Reasonable attempt to repair" means, within the terms of an express warranty applicable to a new assistive device:

(A) Presenting the assistive device for repair of the same nonconformity on at least three (3) separate occasions to the manufacturer, assistive device lessor, or any of the manufacturer's authorized assistive device dealers; or

(B) The assistive device is out of service with no assistive device available for loan for an aggregate of at least fourteen (14) calendar days because of warranty nonconformity.

**History.** Acts 1999, No. 953, § 1.

#### **4-105-202. Express warranties.**

(a) A manufacturer who in the State of Arkansas sells an assistive device to a consumer shall provide to the consumer an express warranty to continue no less than one (1) year after first delivery of the assistive device.

(b) In the absence of an express warranty from the manufacturer, the manufacturer shall be deemed to have expressly warranted to the consumer of an assistive device that for a period of no less than one (1) year after the date of first delivery to the consumer the assistive device will be free from any condition or defect which substantially impairs the value of the assistive device to the consumer.

**History.** Acts 1999, No. 953, § 2.

#### **4-105-203. Warranty.**

If a new assistive device does not conform to an applicable express warranty and the consumer reports the nonconformity to the manufacturer, the assistive device lessor, or any of the manufacturer's authorized assistive device dealers and makes the assistive device available for repair before thirty (30) days after return delivery of the assistive device to a consumer, the nonconformity shall be repaired at no charge to the consumer.

**History.** Acts 1999, No. 953, § 3.

#### **4-105-204. Repair.**

(a) A reasonable amount of time to fix a nonconformity shall be thirty (30) calendar days, with the exchange of a substitute of the consumer's assistive device at the option of the consumer.

(b) If, after a reasonable attempt to repair, the nonconformity is not repaired, then at the direction of the consumer the manufacturer shall do one (1) of the following:

(1) Accept return of the assistive device and replace the assistive device with a comparable new assistive device and refund any collateral costs;

(2)(A) Accept return of the assistive device and refund to the consumer and to any holder of a perfected security interest in the consumer's assistive device, as their interest may appear, the full purchase price plus any finance charge paid by the consumer at the point of sale and collateral costs, less a reasonable allowance for use.

(B) A reasonable allowance for use may not exceed the amount obtained by multiplying the full purchase price of the assistive device

by a fraction, the denominator of which is one thousand four hundred sixty (1,460) and the numerator of which is the number of days that the assistive device was used before the consumer first reported the nonconformity to the assistive device dealer; or

(3) With respect to a consumer who leases an assistive device from an assistive device lessor under a written lease, accept return of the assistive device, refund to the assistive device lessor and to any holder of a perfected security interest in the assistive device, as their interest may appear, the current value of the written lease, and refund to the consumer the amount that the consumer paid under the written lease plus any collateral costs, less a reasonable allowance for use.

**History.** Acts 1999, No. 953, § 4.

#### **4-105-205. Valuation.**

(a) The current value of the written lease equals the total amount for which that lease obligates the consumer during the period of the lease remaining after its early termination, plus the assistive device dealer's early termination costs and the value of the assistive device at the lease expiration date if the lease sets forth that value, less the assistive device lessor's early termination savings.

(b) A reasonable allowance for use may not exceed the amount obtained by multiplying the total amount for which the written lease obligates the consumer by a fraction, the denominator of which is one thousand four hundred sixty (1,460) and the numerator of which is the number of days that the consumer used the assistive device before first reporting the nonconformity to the manufacturer, assistive device lessor, or assistive device dealer.

**History.** Acts 1999, No. 953, § 5.

#### **4-105-206. Refund or replacement.**

(a)(1) To receive a comparable new assistive device or a refund due under the provisions of this subchapter, a consumer shall offer to the manufacturer of the assistive device having the nonconformity to transfer possession of that assistive device to that manufacturer.

(2) No later than fifteen (15) calendar days after that offer, the manufacturer shall provide the consumer with an assistive device or a refund.

(b) After the manufacturer provides the new assistive device or refund, the consumer shall return the assistive device having the nonconformity to the manufacturer or its dealer, along with any endorsements necessary to transfer ownership to the manufacturer.

(c)(1)(A) To receive a refund due under the provisions of this subchapter, a person who leases an assistive device from an assistive device lessor under a written lease shall offer to return the assistive device having the nonconformity to its manufacturer.

(B) No later than fifteen (15) calendar days after that offer, the manufacturer shall provide the refund to the consumer.

(2) After the manufacturer provides the refund, the consumer shall return to the manufacturer the nonconforming assistive device.

(d)(1) To receive a refund due under the provisions of this subchapter, an assistive device lessor shall offer to transfer possession of the assistive device having the nonconformity to its manufacturer.

(2) No later than fifteen (15) calendar days after that offer, the manufacturer shall provide the refund to the assistive device lessor.

(e) A consumer who prevails in any legal proceeding under this subchapter is entitled to recover as part of the judgment a sum equal to the aggregate amount of costs and expenses, including attorney's fees based upon actual time expended by the attorney, determined by the court to have been reasonably incurred by the consumer for or in connection with the commencement and prosecution of the action.

**History.** Acts 1999, No. 953, § 6.

## CHAPTER 106

### DISCOUNT CARDS

#### SUBCHAPTER.

1. GENERAL PROVISIONS. [RESERVED.]
2. HEALTH-RELATED CASH DISCOUNT CARDS.

#### SUBCHAPTER 1 — GENERAL PROVISIONS

[Reserved]

#### SUBCHAPTER 2 — HEALTH-RELATED CASH DISCOUNT CARDS

##### SECTION.

- 4-106-201. Prohibited practices.  
 4-106-202. Penalty.  
 4-106-203. Designation and registration  
                   of agent.

##### SECTION.

- 4-106-204. Construction.  
 4-106-205. Right to rescind contract —  
                   No waiver of claims.

#### **4-106-201. Prohibited practices.**

It shall be unlawful and a violation of this subchapter for any person to sell, market, promote, advertise, or otherwise distribute any card or other purchasing mechanism or device which is not insurance that purports to offer discounts or access to discounts from health care providers in health-related purchases if:

(1) The card or other purchasing mechanism or device does not expressly provide in bold and prominent type that the discounts are not insurance;

(2) The card or other purchasing mechanism or device does not expressly provide in bold and prominent type on the card or in a statement attached to the card that the consumer has the right to

cancel his or her registration within thirty (30) days from the effective date of the card or other purchasing mechanism or device;

(3) The discounts are not specifically authorized by an individual and separate contract with each health care provider listed in conjunction with the card or other purchasing mechanism or device;

(4) The discounts or access to discounts offered or the range of discounts or access to the range of discounts offered are, regardless of the literal wording used:

(A) Misleading;

(B) Deceptive; or

(C) Fraudulent;

(5) The card or any advertisements for the card in any form include words or phrases that are commonly associated with the business of insurance, such as "health plan", "preexisting condition", or "coverage", in a way that could have a tendency to deceive the public into believing that the cards are a form of insurance;

(6) The contract for the card or other purchasing mechanism or device, or any other document that is provided to the consumer at the time the card or other purchasing mechanism or device is received, does not contain:

(A) Information in bold and prominent type that a consumer has the right to cancel his or her registration within thirty (30) days from the effective date of the card or other purchasing mechanism or device; and

(B) Instructions on how a consumer may cancel his or her registration;

(7) Printed advertisements and other printed promotional materials concerning the card or other purchasing mechanism or device do not expressly provide in bold and prominent type that:

(A) The discounts are not insurance; and

(B) The card or other purchasing mechanism or device contains a thirty-day cancellation period; and

(8) Electronic advertisements and other electronic promotions concerning the card or other purchasing mechanism or device, including, but not limited to, radio, television, the Internet, and telephone solicitations, do not expressly state in a prominent manner that:

(A) The discounts are not insurance; and

(B) A consumer has the right to cancel the registration within a thirty-day period under § 4-106-205.

**History.** Acts 1999, No. 1406, § 1; 2005, No. 875, § 2.

**A.C.R.C. Notes.** Acts 2005, No. 875, § 1, provided: "Legislative intent.(a) It is found and determined by the General Assembly that:

"(1) Consumers in the State of Arkansas purchase health-related cash discount

cards with the expectation that all health-related cash discount cards will provide significant savings for the cost of health care;

"(2) Many consumers in the State of Arkansas purchase health-related cash discount cards without the seller providing a full explanation of the range of

discounts offered and whether consumers' health-care providers will accept the card; and

"(3) Many health-related cash discount card providers do not clearly indicate in advertisements or during the sales process that discount cards are not insurance.

"(b) This act is intended to provide consumers in the State of Arkansas with:

"(1) Additional protections that will ensure that they have sufficient information with which to make an informed decision before agreeing to purchase a health-related cash discount card; and

"(2) A sufficient time period in which to cancel a health-related cash discount card."

#### **4-106-202. Penalty.**

(a) The Attorney General, any person, firm, private corporation, municipal or other public corporation, or trade association may maintain an action to enjoin a continuance of any act or acts in violation of this subchapter and for the recovery of damages.

(b) Any person subject to liability under this section shall be deemed as a matter of law to have purposely availed himself of the privileges of conducting activities within Arkansas sufficient to subject the person to the personal jurisdiction of the circuit court hearing an action brought pursuant to this subchapter.

(c) An action for violation of this section may be brought:

(1) In the county where the plaintiff resides;

(2) In the county where the plaintiff conducts business;

(3) In the county where the card or other purchasing mechanism or device was sold, marketed, promoted, advertised, or otherwise distributed; or

(4) In the Pulaski County Circuit Court if the action is initiated by the Attorney General.

(d)(1) If, in such action, the court shall find that the defendant is violating or has violated any of the provisions of this subchapter, it shall enjoin the defendant from a continuance thereof.

(2) It shall not be necessary, except to recover for actual damages under subdivision (d)(3)(B) of this section, that actual damages to the plaintiff be alleged or proved.

(3) In addition to injunctive relief, the plaintiff in the action shall be entitled to recover from the defendant:

(A) Whichever is greater:

(i) One hundred dollars (\$100) per card or other purchasing mechanism or device sold, marketed, promoted, advertised, or otherwise distributed within the State of Arkansas; or

(ii) Ten thousand dollars (\$10,000);

(B) Three (3) times the amount of the actual damages, if any, sustained;

(C) Reasonable attorney's fees;

(D) Costs; and

(E) Any other relief which the court deems proper.

(e)(1) All actions under this section shall be commenced within two (2) years after the date on which the violation of this subchapter occurs

or within two (2) years after the person bringing the action discovers or in the exercise of reasonable diligence should have discovered the occurrence of the violation of this subchapter.

(2) The period of limitation provided in this section may be extended for a period of one hundred eighty (180) days if the person bringing the action proves by a preponderance of the evidence that the failure to timely commence the action was caused by the defendant's engaging in conduct solely calculated to induce the plaintiff to refrain from or postpone the commencement of the action.

(f)(1) Any defendant in an action brought under the provisions of this subchapter may be required to testify under the provisions of §§ 16-43-211 and 16-43-701.

(2) In addition, the books and records of the defendant may be brought into court and introduced, by reference, into evidence.

(g) The remedies prescribed in this section are cumulative and in addition to the remedies prescribed in § 4-88-101 et seq. and any other applicable criminal, civil, or administrative penalties.

**History.** Acts 1999, No. 1406, § 2; 2005, No. 875, §§ 3, 4.

**A.C.R.C. Notes.** Acts 2005, No. 875, § 1, provided: "Legislative intent.(a) It is found and determined by the General Assembly that:

"(1) Consumers in the State of Arkansas purchase health-related cash discount cards with the expectation that all health-related cash discount cards will provide significant savings for the cost of health care;

"(2) Many consumers in the State of Arkansas purchase health-related cash discount cards without the seller providing a full explanation of the range of discounts offered and whether consumers' health-care providers will accept the card; and

"(3) Many health-related cash discount card providers do not clearly indicate in advertisements or during the sales process that discount cards are not insurance.

"(b) This act is intended to provide consumers in the State of Arkansas with:

"(1) Additional protections that will ensure that they have sufficient information with which to make an informed decision before agreeing to purchase a health-related cash discount card; and

"(2) A sufficient time period in which to cancel a health-related cash discount card."

**Cross References.** Jurisdiction of circuit courts, Ark. Const. Amend. 80, §§ 6, 19.

#### **4-106-203. Designation and registration of agent.**

Any person who sells, markets, promotes, advertises, or otherwise distributes any card or other purchasing mechanism or device which is not insurance that purports to offer discounts from health care providers in health-related purchases in Arkansas shall:

(1) Designate an agent who is a resident of Arkansas for service of process; and

(2) Register the agent with the Secretary of State.

**History.** Acts 1999, No. 1406, § 3.

4-106-204. Construction.

Nothing in this subchapter shall be construed to apply to eye or vision care services, glasses, or contact lenses provided by an optometrist or ophthalmologist.

**History.** Acts 1999, No. 1406, § 4.

4-106-205. Right to rescind contract — No waiver of claims.

(a) In addition to any other right to revoke an offer, a buyer who enters into a contract for the purchase of a health-related discount card or other purchasing mechanism or device has the absolute right to cancel the contract and receive a full refund without penalty until midnight of the thirtieth calendar day after the effective date of the card or other purchasing mechanism or device.

(b) The acceptance or use of any card or other purchasing mechanism or device is not a waiver of:

(1) Any claim that may be asserted under this subchapter or under § 4-88-101 et seq.; or

(2) Any other applicable criminal, civil, or administrative penalties.

**History.** Acts 2005, No. 875, § 5.

**A.C.R.C. Notes.** Acts 2005, No. 875, § 1, provided: “Legislative intent.(a) It is found and determined by the General Assembly that:

“(1) Consumers in the State of Arkansas purchase health-related cash discount cards with the expectation that all health-related cash discount cards will provide significant savings for the cost of health care;

“(2) Many consumers in the State of Arkansas purchase health-related cash discount cards without the seller providing a full explanation of the range of discounts offered and whether consumers’

health-care providers will accept the card; and

“(3) Many health-related cash discount card providers do not clearly indicate in advertisements or during the sales process that discount cards are not insurance.

“(b) This act is intended to provide consumers in the State of Arkansas with:

“(1) Additional protections that will ensure that they have sufficient information with which to make an informed decision before agreeing to purchase a health-related cash discount card; and

“(2) A sufficient time period in which to cancel a health-related cash discount card.”

CHAPTER 107

CREDIT CARDS

SUBCHAPTER.

1. GENERAL PROVISIONS. [RESERVED.]
2. TRANSFER OF CREDIT CARD DEBT.
3. UNAUTHORIZED USE OF CREDIT CARDS.

RESEARCH REFERENCES

**ALR.** Liability of credit card issuer under state laws for wrongful billing, cancellation dishonor, or disclosure. 53 A.L.R.4th 231.

**SUBCHAPTER 1 — GENERAL PROVISIONS**

[Reserved]

**SUBCHAPTER 2 — TRANSFER OF CREDIT CARD DEBT****SECTION.**

4-107-201. Definitions.

4-107-202. Cardholders protected.

**SECTION.**

4-107-203. Deceptive trade practices.

4-107-204. Applicability.

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**Cross References.** Deceptive trade practices, § 4-88-101 et seq.

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**4-107-201. Definitions.**

As used in this subchapter, unless the context otherwise requires:

(1) “Card issuer” means any person who issues a credit card or the agent of the person with respect to the credit card;

(2) “Cardholder” means any person to whom a credit card is issued or any person who has agreed with the card issuer to pay obligations arising from the issuance of a credit card to another person;

(3) “Credit” means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment;

(4) “Credit card” means any card, plate, coupon book, or other credit device existing for the purpose of obtaining money, property, labor, or services on credit;

(5)(A) “Creditor” means a person who both:

(i) Regularly extends, whether in connection with loans, sales of property or services, or otherwise, consumer credit which is payable by agreement in more than four (4) installments or for which the payment of a finance charge is or may be required; and

(ii) Is the person to whom the debt arising from the consumer credit transaction is initially payable on the face of the evidence of indebtedness or, if there is no such evidence of indebtedness, by agreement.

(B) In the case of an open-end credit plan involving a credit card, the card issuer is a creditor.

(C) “Creditor” shall also include card issuers, whether or not the amount due is payable by agreement in more than four (4) installments;

(6)(A) “Open-end credit plan” means a plan under which the creditor reasonably contemplates repeated transactions, which prescribes the terms of such transactions, and which provides for a finance charge which may be computed from time to time on the outstanding unpaid balance.

(B) A credit plan which is an open-end credit plan within the meaning of the preceding sentence is an open-end credit plan even if credit information is verified from time to time; and

(7) "Person" means a natural person or an organization.

**History.** Acts 1999, No. 1497, § 1.

#### **4-107-202. Cardholders protected.**

(a) If a credit cardholder transfers an outstanding credit card balance from one credit card account to another credit card account, the creditor issuing the credit card from which the outstanding balance was transferred shall not collect any interest or any other fees attributable to the credit card account for the amount of the outstanding balance having been transferred for any period after the date of the transfer from the account.

(b) Any creditor issuing a credit card who charges a consumer any interest or any other fees after the transfer of an outstanding credit balance from one credit card account to another credit card account shall be liable to the consumer for an amount which is treble the amount of any interest or other fees charged, plus all costs, to include a reasonable amount for attorney's fees.

**History.** Acts 1999, No. 1497, § 2.

#### **4-107-203. Deceptive trade practices.**

(a)(1) Further, a violation of the provisions of this subchapter by a credit card issuer or creditor issuing a credit card shall constitute an unfair and deceptive act or practice as defined by the Deceptive Trade Practices Act, § 4-88-101 et seq.

(2) All remedies, penalties, and authority granted to the Attorney General under the Deceptive Trade Practices Act, § 4-88-101 et seq., shall be available to the Attorney General for the enforcement of this section.

(b) Nothing in this subchapter shall limit the rights or remedies which are otherwise available to the credit card holder under any other law.

(c) The obligations under this subchapter are cumulative and should in no way be deemed to limit the obligations imposed under any other state or federal law.

**History.** Acts 1999, No. 1497, § 3.

#### **4-107-204. Applicability.**

Notwithstanding the federal Consumer Credit Protection Act, 15 U.S.C. § 1601 et seq., or any other federal or state laws protecting the rights of consumers who are issued credit cards in this state or other states, the provisions of this subchapter shall apply to all qualifying

credit card account transactions where a creditor has chosen to issue a credit card to a citizen of the State of Arkansas or has chosen to continue to offer a credit card account to a citizen in Arkansas and shall thereby be governed by the provisions of this subchapter.

**History.** Acts 1999, No. 1497, § 4.

### SUBCHAPTER 3 — UNAUTHORIZED USE OF CREDIT CARDS

#### SECTION.

4-107-301. Legislative findings.

4-107-302. "Credit card" defined.

#### SECTION.

4-107-303. Printing card number on receipts.

#### **4-107-301. Legislative findings.**

The General Assembly finds, determines, and declares that:

(1) Credit, particularly the use of credit cards, is an important tool for consumers in today's economy;

(2) Unscrupulous persons often fraudulently use the credit card accounts of others by stealing the credit card itself or obtaining the necessary information to fraudulently charge the purchase of goods and services to another person's credit card account; and

(3) Protection from unauthorized use of credit card accounts is necessary.

**History.** Acts 2003, No. 274, § 1.

### RESEARCH REFERENCES

**U. Ark. Little Rock L. Rev.** Survey of assembly, Business Law, 26 U. Ark. Little Rock L. Rev. 351.

#### **4-107-302. "Credit card" defined.**

As used in this subchapter, "credit card" means:

(1) Any instrument or device, whether known as a credit card, charge card, credit plate, courtesy card, or identification card, or by any other name, that is issued with or without fee by an issuer for the use of the cardholder in obtaining money, goods, services, or anything else of value, either on credit or in possession or in consideration of any undertaking or guaranty by the issuer of the payment of a check drawn by the cardholder, on a promise to pay in part or in full therefor at a future time, whether or not all or any part of the indebtedness that is represented by the promise to make deferred payment is secured or unsecured;

(2) A debit card, electronic benefit transfer card, or other access instrument or device, other than a check that is signed by the holder or other authorized signatory on the deposit account, that draws funds from a deposit account in order to obtain money, goods, services, or anything else of value;

(3) A stored value card, smart card, or other instrument or device that enables a person to obtain goods, services, or anything else of value through the use of value stored on the card, instrument, or device; and

(4) The number that is assigned to the card, instrument, or device described in subdivisions (1), (2), or (3) of this section, even if the physical card, instrument, or device is not used or presented.

**History.** Acts 2003, No. 274, § 1.

#### **4-107-303. Printing card number on receipts.**

(a) No person, firm, partnership, association, corporation, limited liability company, or other entity accepting credit cards for the transaction of business shall print more than the last five (5) digits of the credit card account number, the credit card expiration date, or both, on a credit card receipt to the cardholder.

(b)(1) This section shall apply only to the receipts that are electronically printed and shall not apply to transactions in which the sole means of recording the credit card number is by handwriting or by an imprint or copy of the credit card.

(2)(A) Except as provided in subdivision (b)(2)(C) of this section, this section applies to any person or entity formed on and after July 16, 2003, that uses a cash register or any other machine or device that electronically imprints receipts of credit card transactions.

(B) Except as provided in subdivision (b)(2)(C) of this section, beginning January 1, 2004, this section also applies to any person or entity formed before July 16, 2003, that uses a cash register and any other machine or device that electronically imprints receipts of credit card transactions.

(C) Until January 1, 2005, this section shall not apply to:

(i) Institutions of higher education; or

(ii) Persons or entities employing no more than twenty-five (25) employees or who have generated no more than five million dollars (\$5,000,000) annually in revenues from the person's business activities.

**History.** Acts 2003, No. 274, § 1.

## **CHAPTER 108**

### **FUEL AND LUBRICANTS**

#### **SUBCHAPTER.**

1. GENERAL PROVISIONS. [RESERVED.]
2. QUALITY SPECIFICATIONS.

## SUBCHAPTER 1 — GENERAL PROVISIONS

[Reserved]

## SUBCHAPTER 2 — QUALITY SPECIFICATIONS

### SECTION.

- 4-108-201. Purpose.
- 4-108-202. Scope.
- 4-108-203. Definitions.
- 4-108-204. Administration — Adoption of standards — Rules.
- 4-108-205. State Petroleum Products Division — General duties and powers.
- 4-108-206. Registration of engine fuels designed for special use.

### SECTION.

- 4-108-207. Prohibited acts.
- 4-108-208. Civil penalties.
- 4-108-209. Criminal penalties.
- 4-108-210. Restraining order and injunction.
- 4-108-211. Title.
- 4-108-212. Regulations.
- 4-108-213. Regulations to be unaffected by repeal of prior enabling statute.

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**Effective Dates.** Acts 2001, No. 586, § 15: Mar. 7, 2001. Emergency clause provided: “It is hereby found and determined by the General Assembly that the present state laws and regulatory authority regarding standards for engine fuels, petroleum products, and automotive lubricants are outdated; that this act adopts modern standards and grants the Director of the State Plant Board appropriate authority to maintain up-to-date standards hereafter; and that until this act becomes effective the employees of the State Plant Board will remain hampered in perform-

ing their lawful duties. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto.”

### 4-108-201. Purpose.

- (a) There should be uniform requirements for engine fuels, petroleum products, and automotive lubricants among the several states.
- (b) This subchapter provides for the establishment of quality specifications for these products.

**History.** Acts 2001, No. 586, § 1.

## RESEARCH REFERENCES

- U. Ark. Little Rock L. Rev.** Survey of Legislation, 2001 Arkansas General Assembly, Business Law, 24 U. Ark. Little Rock L. Rev. 407.

**4-108-202. Scope.**

(a) This subchapter establishes a sampling, testing, and enforcement program, requires registration of engine fuels, and empowers the state to promulgate regulations as needed to carry out the provisions of this subchapter.

(b) It also provides for administrative, civil, and criminal penalties.

**History.** Acts 2001, No. 586, § 2.

**4-108-203. Definitions.**

As used in this subchapter:

(1) “ASTM” means the American Society for Testing and Materials, a national voluntary consensus standards organization formed for the development of standards on characteristics and performance of materials, products, systems, and services, and the promotion of related knowledge;

(2) “Automotive lubricants” means any material interposed between two (2) surfaces that reduces the friction or wear between them;

(3) “Board” means the State Plant Board;

(4) “Director” means the Director of the State Plant Board and its designated agents;

(5) “Engine fuel” means any liquid or gaseous matter used for the generation of power in an internal combustion engine;

(6)(A) “Engine fuel designed for special use” means engine fuels designated by the director as requiring registration.

(B)(i) These fuels normally have no American Society for Testing and Materials or other national consensus standards applying to their quality or usability.

(ii) Common special fuels are racing fuels and those intended for agricultural and other off-road applications;

(7) “Person” means an individual, corporation, company, society, association, partnership, or governmental entity;

(8) “Petroleum products” means products obtained from distilling and processing of petroleum, crude oil, unfinished oils, recycled oils, natural gas liquids, refinery blend stocks, and other miscellaneous hydrocarbon compounds; and

(9) “Sold” means kept, offered, or exposed for sale, or sold.

**History.** Acts 2001, No. 586, § 3.

**4-108-204. Administration — Adoption of standards — Rules.**

(a) The provisions of this subchapter shall be administered by the Director of the State Plant Board.

(b)(1)(A) For the purpose of administering and giving effect to the provisions of this subchapter, the board may adopt the specification and test method standards set forth in both the most recent edition of the National Institute of Standards and Technology Handbook 130

and the most recent edition of the Annual Book of ASTM Standards and supplements thereto, and revisions thereof.

(B) When no American Society for Testing and Materials standard exists, other generally recognized national consensus standards may be used.

(2) The board is empowered to write rules and regulations on the advertising, posting of prices, labeling, standards for, and identity of fuels, petroleum products, and automotive lubricants and is authorized to establish a testing laboratory.

**History.** Acts 2001, No. 586, § 4.

#### **4-108-205. State Petroleum Products Division — General duties and powers.**

(a) There is hereby created a State Petroleum Products Division located for administrative purposes within the Arkansas Bureau of Standards of the State Plant Board.

(b) The board shall have the authority to:

(1)(A) Enforce and administer all the provisions of this subchapter by inspections, analyses, and other appropriate actions;

(B)(i) Have access during normal business hours to all places where engine fuels, petroleum products, and automotive lubricants are kept, transferred, offered, exposed for sale, or sold for the purpose of examination, inspection, taking of samples, and investigation.

(ii) If such access shall be refused by the owner or agent or other persons leasing the same, the director may obtain an administrative search warrant from a court of competent jurisdiction;

(C) Collect, or cause to be collected, samples of engine fuels, petroleum products, and automotive lubricants marketed in this state, and cause such samples to be tested or analyzed for compliance with the provisions of this subchapter;

(D) Define engine fuels for special use and refuse, revoke, suspend, or issue a stop-order if found not to be in compliance and remand a stop-order if the engine fuel for special use is brought into full compliance with this subchapter;

(E) Issue a stop-sale order for any engine fuel, petroleum product, and automotive lubricant found not to be in compliance and remand the stop-sale order if the engine fuel, petroleum product, or automotive lubricant is brought into full compliance with this subchapter; and

(F) Refuse, revoke, or suspend the registration of an engine fuel, petroleum product, or automotive lubricant; and

(2) Delegate to appropriate personnel any of these responsibilities for the proper administration of this subchapter.

**History.** Acts 2001, No. 586, § 5.

**4-108-206. Registration of engine fuels designed for special use.**

(a) All engine fuels designed for special use must be registered with the board.

(b) Such registration shall include the:

- (1) Name, brand, or trademark under which the fuel will be sold;
- (2) Name and address of the person registering the engine fuel;
- (3) Special use for which the engine fuel is designed; and
- (4) Certification, declaration, or affidavit stating the specifications which the fuel will meet upon testing.

**History.** Acts 2001, No. 586, § 6.

**4-108-207. Prohibited acts.**

It shall be unlawful to:

(1) Represent engine fuels, petroleum products, or automotive lubricants in any manner that may deceive or tend to deceive the purchaser as to the nature, brand, price, quantity, or quality of the products;

(2) Fail to register an engine fuel designed for special use;

(3) Submit incorrect, misleading, or false information regarding the registration of an engine fuel designed for special use;

(4) Hinder or obstruct the State Plant Board in the performance of its duties;

(5) Represent an engine fuel, petroleum product, or automotive lubricant that is contrary to the provisions of this subchapter; and

(6) Represent automotive lubricants with a Society of Automotive Engineers viscosity grade or American Petroleum Institute service classification other than those specified by the intended purchaser.

**History.** Acts 2001, No. 586, § 7.

**4-108-208. Civil penalties.**

(a)(1) Any person who by himself or herself, by his or her servant or agent, or as the servant or agent of another person, commits any of the acts enumerated in § 4-108-207 may be assessed by the State Plant Board a civil penalty of:

(A) Not less than one hundred dollars (\$100) nor more than three hundred dollars (\$300) for a first violation;

(B) Not less than four hundred dollars (\$400) nor more than six hundred dollars (\$600) for a second violation within three (3) years after the date of the first violation; and

(C) Not less than seven hundred dollars (\$700) nor more than one thousand dollars (\$1,000) for a third violation within three (3) years after the date of the first violation.

(2) For a violation to be considered as a second or subsequent offense, it must be a repeat of a violation as enumerated in § 4-108-207.

(b)(1) Any person subject to a civil penalty shall have a right to request an administrative hearing within ten (10) calendar days after receipt of the notice of the penalty.

(2) The board or a subcommittee of the board shall be authorized to conduct the hearing after giving appropriate notice to the respondent.

(3) The decision of the board shall be subject to appropriate judicial review under the Arkansas Administrative Procedure Act, § 25-15-201 et seq.

(c)(1) If the respondent has exhausted his or her administrative appeals and the civil penalty has been upheld, he or she shall pay the civil penalty within twenty (20) calendar days after the effective date of the final decision.

(2) If the respondent fails to pay the penalty, a civil action may be brought by the director in any court of competent jurisdiction to recover the penalty.

(3) Any civil penalty collected under this section shall be transmitted to the Plant Board Fund.

**History.** Acts 2001, No. 586, § 8.

**Cross References.** Plant Board Fund,  
§ 19-6-408.

#### **4-108-209. Criminal penalties.**

Any person who intentionally violates any provision of this subchapter or regulations promulgated thereto shall be guilty of a Class A misdemeanor.

**History.** Acts 2001, No. 586, § 9.

#### **4-108-210. Restraining order and injunction.**

The Director of the State Plant Board is authorized to apply to any court of competent jurisdiction for a restraining order or a temporary or permanent injunction restraining any person from violating any provision of this subchapter.

**History.** Acts 2001, No. 586, § 10.

#### **4-108-211. Title.**

This subchapter shall be known and may be cited as the “Engine Fuels, Petroleum Products, and Automotive Lubricants Inspection Act of 2001”.

**History.** Acts 2001, No. 586, § 11.

#### **4-108-212. Regulations.**

(a) The State Plant Board may by regulation adopted pursuant to the Arkansas Administrative Procedure Act, § 25-15-201 et seq., adopt as a regulation of the Arkansas Bureau of Standards specifications, toler-

ances, and regulations for engine fuels, petroleum products and automotive lubricants set out in National Institute of Standards and Technology Handbook 130, or in any similar publication issued by the National Institute of Standards and Technology.

(b) In drafting the regulations, the bureau shall consider whether the specifications, tolerances, and regulations published by the National Institute of Standards and Technology are consistent with the needs of Arkansas businesses and consumers and may modify, amend, or delete suggested language found in the National Institute of Standards and Technology handbooks.

**History.** Acts 2001, No. 586, § 12.

#### **4-108-213. Regulations to be unaffected by repeal of prior enabling statute.**

The adoption of this subchapter or any of its provisions shall not affect any regulations promulgated pursuant to the authority of any earlier enabling statute unless inconsistent with this subchapter or modified or revoked by the State Plant Board.

**History.** Acts 2001, No. 586, § 13.

## **CHAPTER 109**

### **USE OF "NOTARIO" AND SIMILAR TERMS**

#### **SECTION.**

4-109-101. Definitions.

4-109-102. Prohibited acts and practices.

4-109-103. Notice required.

#### **SECTION.**

4-109-104. Exceptions.

4-109-105. Enforcement.

#### **4-109-101. Definitions.**

As used in this chapter:

(1) "Notary public" means a person duly appointed or commissioned under § 21-14-101;

(2) "Person" means:

- (A)(i) An individual;
- (ii) An organization;
- (iii) An association;
- (iv) A partnership;
- (v) A limited liability company; or
- (vi) A corporation; or
- (B) Any combination of them; and

(3) "Practice of law" means:

- (A) Holding oneself out to the public as being entitled to practice law;
- (B) Tendering or furnishing legal services or advice;
- (C) Furnishing attorneys or counsel;

(D) Rendering legal services of any kind in actions or proceedings of any nature or in any other way or manner;

(E) Acting as if or in any other manner assuming to be entitled to practice law; or

(F) Advertising or assuming the title of lawyer or attorney, attorney at law, or equivalent terms in any language in such a manner as to convey the impression that one is entitled to practice law or to furnish legal advice, service, or counsel.

**History.** Acts 2005, No. 66, § 1.

#### **4-109-102. Prohibited acts and practices.**

It is a violation of this chapter for any person to advertise his or her services using the terms “notario ” or “notario publico”, or any similar term, unless the person is a notary public as defined in this subchapter and the person complies with the notice requirements in § 4-109-103.

**History.** Acts 2005, No. 66, § 1.

#### **4-109-103. Notice required.**

(a) Any notary public who chooses to use the term “notario” or “notario publico”, or any similar terms, in any advertisement shall include in the advertisement the following notice:

“I AM NOT A LICENSED ATTORNEY AND CANNOT ENGAGE IN THE PRACTICE OF LAW. I AM NOT A REPRESENTATIVE OF ANY GOVERNMENTAL AGENCY WITH AUTHORITY OVER IMMIGRATION OR CITIZENSHIP AND I CANNOT OFFER LEGAL ADVICE OR OTHER ASSISTANCE REGARDING IMMIGRATION.”

(b) The notice shall be provided in both English and Spanish.

**History.** Acts 2005, No. 66, § 1.

#### **4-109-104. Exceptions.**

This chapter does not apply to an attorney licensed in this state.

**History.** Acts 2005, No. 66, § 1.

#### **4-109-105. Enforcement.**

A violation of this chapter is an unconscionable or deceptive act or practice, as defined by the Deceptive Trade Practices Act, § 4-88-101 et seq.

**History.** Acts 2005, No. 66, § 1.

## CHAPTER 110

### PERSONAL INFORMATION PROTECTION ACT

#### SECTION.

- 4-110-101. Short title.
- 4-110-102. Findings and purpose.
- 4-110-103. Definitions.
- 4-110-104. Protection of personal information.

#### SECTION.

- 4-110-105. Disclosure of security breaches.
- 4-110-106. Exemptions.
- 4-110-107. Waiver.
- 4-110-108. Penalties.

#### 4-110-101. Short title.

This chapter shall be known and cited as the “Personal Information Protection Act”.

**History.** Acts 2005, No. 1526, § 1.

#### RESEARCH REFERENCES

**U. Ark. Little Rock L.J.** Survey of assembly, Business Law, 28 U. Ark. Little Rock L. Rev. 321.

#### 4-110-102. Findings and purpose.

(a) It is the intent of the General Assembly to ensure that sensitive personal information about Arkansas residents is protected.

(b) To that end, the purpose of this chapter is to encourage individuals, businesses, and state agencies that acquire, own, or license personal information about the citizens of the State of Arkansas to provide reasonable security for the information.

**History.** Acts 2005, No. 1526, § 1.

#### 4-110-103. Definitions.

As used in this chapter:

(1)(A) “Breach of the security of the system” means unauthorized acquisition of computerized data that compromises the security, confidentiality, or integrity of personal information maintained by a person or business.

(B) “Breach of the security of the system” does not include the good faith acquisition of personal information by an employee or agent of the person or business for the legitimate purposes of the person or business if the personal information is not otherwise used or subject to further unauthorized disclosure;

(2)(A) “Business” means a sole proprietorship, partnership, corporation, association, or other group, however organized and whether or not organized to operate at a profit, including a financial institution organized, chartered, or holding a license or authorization certificate under the law of this state, any other state, the United States, or of

any other country or the parent or the subsidiary of a financial institution.

(B) "Business" includes:

(i) An entity that destroys records; and

(ii) A state agency;

(3) "Customer" means an individual who provides personal information to a business for the purpose of purchasing or leasing a product or obtaining a service from the business;

(4) "Individual" means a natural person;

(5) "Medical information" means any individually identifiable information, in electronic or physical form, regarding the individual's medical history or medical treatment or diagnosis by a health care professional;

(6) "Owns or licenses" includes, but is not limited to, personal information that a business retains as part of the internal customer account of the business or for the purpose of using the information in transactions with the person to whom the information relates;

(7) "Personal information" means an individual's first name or first initial and his or her last name in combination with any one (1) or more of the following data elements when either the name or the data element is not encrypted or redacted:

(A) Social security number;

(B) Driver's license number or Arkansas identification card number;

(C) Account number, credit card number, or debit card number in combination with any required security code, access code, or password that would permit access to an individual's financial account; and

(D) Medical information;

(8)(A) "Records" means any material that contains sensitive personal information in electronic form.

(B) "Records" does not include any publicly available directories containing information an individual has voluntarily consented to have publicly disseminated or listed, such as name, address, or telephone number; and

(9) "State agencies" or "state agency" means any agency, institution, authority, department, board, commission, bureau, council, or other agency of the State of Arkansas supported by cash funds or the appropriation of state or federal funds.

**History.** Acts 2005, No. 1526, § 1.

#### **4-110-104. Protection of personal information.**

(a) A person or business shall take all reasonable steps to destroy or arrange for the destruction of a customer's records within its custody or control containing personal information that is no longer to be retained by the person or business by shredding, erasing, or otherwise modifying

the personal information in the records to make it unreadable or undecipherable through any means.

(b) A person or business that acquires, owns, or licenses personal information about an Arkansas resident shall implement and maintain reasonable security procedures and practices appropriate to the nature of the information to protect the personal information from unauthorized access, destruction, use, modification, or disclosure.

**History.** Acts 2005, No. 1526, § 1.

#### **4-110-105. Disclosure of security breaches.**

(a)(1) Any person or business that acquires, owns, or licenses computerized data that includes personal information shall disclose any breach of the security of the system following discovery or notification of the breach of the security of the system to any resident of Arkansas whose unencrypted personal information was, or is reasonably believed to have been, acquired by an unauthorized person.

(2) The disclosure shall be made in the most expedient time and manner possible and without unreasonable delay, consistent with the legitimate needs of law enforcement as provided in subsection (c) of this section, or any measures necessary to determine the scope of the breach and to restore the reasonable integrity of the data system.

(b) Any person or business that maintains computerized data that includes personal information that the person or business does not own shall notify the owner or licensee of the information of any breach of the security of the system immediately following discovery if the personal information was, or is reasonably believed to have been, acquired by an unauthorized person.

(c)(1) The notification required by this section may be delayed if a law enforcement agency determines that the notification will impede a criminal investigation.

(2) The notification required by this section shall be made after the law enforcement agency determines that it will not compromise the investigation.

(d) Notification under this section is not required if, after a reasonable investigation, the person or business determines that there is no reasonable likelihood of harm to customers.

(e) For purposes of this section, notice may be provided by one (1) of the following methods:

(1) Written notice;

(2) Electronic mail notice if the notice provided is consistent with the provisions regarding electronic records and signatures set forth in 15 U.S.C. § 7001, as it existed on January 1, 2005; or

(3)(A) Substitute notice if the person or business demonstrates that:

(i) The cost of providing notice would exceed two hundred fifty thousand dollars (\$250,000);

(ii) The affected class of persons to be notified exceeds five hundred thousand (500,000); or

(iii) The person or business does not have sufficient contact information.

(B) Substitute notice shall consist of all of the following:

(i) Electronic mail notice when the person or business has an electronic mail address for the subject persons;

(ii) Conspicuous posting of the notice on the website of the person or business if the person or business maintains a website; and

(iii) Notification by statewide media.

(f) Notwithstanding subsection (e) of this section, a person or business that maintains its own notification procedures as part of an information security policy for the treatment of personal information and is otherwise consistent with the timing requirements of this section shall be deemed to be in compliance with the notification requirements of this section if the person or business notifies affected persons in accordance with its policies in the event of a breach of the security of the system.

**History.** Acts 2005, No. 1526, § 1.

#### **4-110-106. Exemptions.**

(a)(1) The provisions of this chapter do not apply to a person or business that is regulated by a state or federal law that provides greater protection to personal information and at least as thorough disclosure requirements for breaches of the security of personal information than that provided by this chapter.

(2) Compliance with the state or federal law shall be deemed compliance with this chapter with regard to the subjects covered by this chapter.

(b) This section does not relieve a person or business from a duty to comply with any other requirements of other state and federal law regarding the protection and privacy of personal information.

**History.** Acts 2005, No. 1526, § 1.

#### **4-110-107. Waiver.**

Any waiver of a provision of this chapter is contrary to public policy, void, and unenforceable.

**History.** Acts 2005, No. 1526, § 1.

#### **4-110-108. Penalties.**

Any violation of this chapter is punishable by action of the Attorney General under the provisions of § 4-88-101 et seq.

**History.** Acts 2005, No. 1526, § 1.

## CHAPTER 111

### CONSUMER PROTECTION AGAINST COMPUTER SPYWARE ACT

**SECTION.**

4-111-101. Short title.

4-111-102. Definitions.

4-111-103. Unlawful acts — Exceptions.

**SECTION.**

4-111-104. Penalties.

4-111-105. Use of Spyware Monitoring Fund.

**4-111-101. Short title.**

This chapter shall be known and cited as the “Consumer Protection Against Computer Spyware Act”.

**History.** Acts 2005, No. 2255, § 1.

**4-111-102. Definitions.**

As used in this chapter:

(1) “Advertisement” means a communication, the primary purpose of which is the commercial promotion of a commercial product or service, including content on an Internet website operated for a commercial purpose;

(2) “Authorized user”, with respect to a computer, means a person that owns or is authorized by the owner or lessee to use the computer;

(3) “Bundled software” means software that is acquired through the installation of a large number of separate programs in a single installation when the programs are wholly unrelated to the purpose of the installation as described to the authorized user;

(4)(A) “Cause to be copied” means to distribute or transfer computer software or any component of computer software.

(B) “Cause to be copied” does not include providing:

(i) Transmission, routing, intermediate temporary storage, or caching of software;

(ii) A compact disk, website, computer server, or other storage medium through which the software was distributed by a third party;  
or

(iii) A directory, index, reference, pointer, hypertext link, or other information location tool through which the user of the computer located the software;

(5) “Computer software” means a sequence of instructions written in any programming language that is executed on a computer but does not include a text or data file, including a cookie;

(6) “Computer virus” means a computer program or other set of instructions that is designed to do the following acts without the authorization of the owner or owners of a computer or computer network:

(A) Degrade the performance of or disable a computer or computer network; and

(B) Have the ability to replicate itself on another computer or computer network;

(7) "Damage" means any significant impairment to the integrity, confidentiality, or availability of data, software, a system, or information, including, but not limited to, the:

(A) Significant and intentional degradation of the performance of a computer or a computer network; or

(B) Intentional disabling of a computer or computer network;

(8) "Distributed denial of service" or "DDoS attack" means techniques or actions involving the use of one (1) or more damaged computers to damage another computer or a targeted computer system in order to shut the computer or computer system down and deny the service of the damaged computer or computer system to legitimate users;

(9) "Execute", when used with respect to computer software, means the performance of the functions or the carrying out of the instructions of the computer software;

(10) "Hardware" means a comprehensive term for all of the discrete physical parts of a computer as distinguished from:

(A) The data the computer contains or that enables it to operate; and

(B) The software that provides instructions for the hardware to accomplish tasks;

(11) "Intentionally deceptive" means with the intent to deceive an authorized user in order to either damage a computer or computer system or wrongfully obtain personally identifiable information without authority:

(A) To make an intentional and materially false or fraudulent statement;

(B) To make a statement or description that intentionally omits or misrepresents material information; or

(C) An intentional and material failure to provide any notice to an authorized user regarding the download or installation of software;

(12) "Internet" means:

(A) The international computer network of both federal and non-federal interoperable packet switched data networks; or

(B) The global information system that:

(i) Is logically linked together by a globally unique address space based on the Internet Protocol (IP) or its subsequent extensions;

(ii) Is able to support communications using the Transmission Control Protocol/Internet Protocol (TCP/IP) suite, its subsequent extensions, or other IP-compatible protocols; and

(iii) Provides, uses, or makes accessible, either publicly or privately, high-level services layered on the communications and related infrastructure described in this subdivision (12);

(13) "Internet address" means a specific location on the Internet accessible through a universal resource locator or Internet protocol address;

(14) "Person" means one (1) or more individuals, partnerships, corporations, limited liability companies, or other organizations;

(15) "Personally identifiable information" means any of the following if it allows the entity holding the information to identify an authorized user by:

(A) First name or first initial in combination with last name;

(B) Credit or debit card numbers or other financial account numbers;

(C) A password or personal identification number or other identification required to access an identified account other than a password, personal identification number, or other identification transmitted by an authorized user to the issuer of the account or its agent;

(D) A social security number; or

(E) Any of the following information in a form that personally identifies an authorized user:

(i) Account balances;

(ii) Overdraft history;

(iii) Payment history;

(iv) A history of websites visited;

(v) Home address;

(vi) Work address; or

(vii) A record of a purchase or purchases; and

(16) "Phishing" means the use of electronic mail or other means to imitate a legitimate company or business in order to entice the user into divulging passwords, credit card numbers, or other sensitive information for the purpose of committing theft or fraud.

**History.** Acts 2005, No. 2255, § 1.

#### **4-111-103. Unlawful acts — Exceptions.**

(a) A person that is not an authorized user with actual knowledge, with conscious avoidance of actual knowledge or willfully, shall not cause computer software to be copied onto any computer in this state nor use the software to:

(1) Modify, through intentionally deceptive means, any of the following settings related to the computer's access to, or use of, the Internet:

(A) The page which appears when an authorized user launches an Internet browser or similar software program used to access and navigate the Internet;

(B) The default provider or web proxy the authorized user uses to access or search the Internet;

(C) The authorized user's list of bookmarks used to access web pages; or

(D) Settings in computer software or in a text or data file on the computer that are used to resolve a universal resource locator or other location identifier used to access a public or private network;

(2) Collect, through intentionally deceptive means, personally identifiable information about the authorized user that:

(A) Is collected through the use of a keystroke-logging function that records all keystrokes made by an authorized user who uses the computer and transmits the information from the computer to another person;

(B) Includes all or substantially all of the Internet addresses visited by an authorized user, other than Internet addresses of the provider of the software, if the computer software was installed in an intentionally deceptive manner to conceal from all authorized users of the computer the fact that the software is being installed;

(C) Is extracted from a computer hard drive for a purpose wholly unrelated to any of the purposes of the software or service as described to the authorized user;

(D) Is collected by extracting screen shots of an authorized user's use of the computer for a purpose wholly unrelated to any of the purposes of the software or service as described to the authorized user;

(3) Prevent without authorization from the authorized user through intentionally deceptive means an authorized user's reasonable efforts to block the installation of or disable software by causing software that the authorized user has properly removed or disabled to automatically reinstall or reactivate on the computer without the authorization of an authorized user;

(4) Intentionally misrepresent that software will be uninstalled or disabled by an authorized user's action with knowledge that the software will not be uninstalled or disabled; or

(5) Through intentionally deceptive means remove, disable, or render inoperative security, antispyware, or antivirus software installed on the computer.

(b) A person who is not an authorized user who with actual knowledge, with conscious avoidance of actual knowledge, or willfully shall not:

(1) Cause computer software to be copied onto any computer in this state and use the software to take control of a computer by:

(A) Transmitting or relaying without the authorization of an authorized user commercial electronic mail or a computer virus from the consumer's computer;

(B) Accessing or using the authorized user's modem or Internet service for the purpose of causing:

(i) Damage to the authorized user's computer; or

(ii) An authorized user to incur financial charges for a service that is not authorized by the authorized user;

(C) Using the consumer's computer as part of an activity performed by a group of computers for the purpose of causing damage to another computer, including, but not limited to, launching a denial of service attack; or

(D) Opening multiple, sequential, stand-alone advertisements in the authorized user's Internet browser without the authorization of an authorized user and with knowledge that a reasonable computer

user can not close the advertisements without turning off the computer or closing the authorized user's Internet browser;

(2) Without authorization obtain the ability to use one (1) or more computers of other end users on a network to send commercial electronic mail, to damage other computers, or to locate other computers vulnerable to an attack without:

(A) Notice to or knowledge of the owners of the computers or computer networks; or

(B) A prior or existing personal, business, or contractual relationship with the owner or owners of the computer or computer networks;

(3) Modify any of the following settings related to the computer's access to, or use of, the Internet:

(A) An authorized user's security or other settings that protect information about the authorized user for the purpose of stealing personal information of an authorized user; or

(B) The security settings of the computer for the purpose of causing damage to one (1) or more computers;

(4) Prevent without the authorization of an authorized user an authorized user's reasonable efforts to block the installation of or disable software by presenting the authorized user with an option to decline installation of software with knowledge that when the option is selected by the authorized user the installation nevertheless proceeds; or

(5) Intentionally interfere with an authorized user's attempt to uninstall the software by:

(A) Leaving behind without authorization on the authorized user's computer for the purpose of evading an authorized user's attempt to remove the software from the computer hidden elements of the software that are designed to and will reinstall the software or portions of the software;

(B) Intentionally causing damage to or removing any vital component of the operating system;

(C) Falsely representing that software has been disabled;

(D) Changing the name, location, or other designation information of the software for the purpose of preventing an authorized user from locating the software to remove it;

(E) Using randomized or intentionally deceptive file names, directory folders, formats, or registry entries for the purpose of avoiding detection and removal of the software by an authorized user;

(F) Causing the installation of software in a particular computer directory or computer memory for the purpose of evading an authorized user's attempt to remove the software from the computer;

(G) Requiring completion of a survey to uninstall software unless reasonably related to the uninstallation; or

(H) Requiring without the authority of the owner of the computer that an authorized user obtain a special code or download a special program from a third party to uninstall the software.

(c) A person that is not an authorized user, with regard to any computer in this state, shall not:

(1) Induce an authorized user to install a software component onto the computer by intentionally misrepresenting that installing software is necessary for security or privacy reasons or in order to open, view, or play a particular type of content or software; or

(2) Deceptively cause the copying and execution on the computer of a computer software component with the intent of causing an authorized user to use the component in a way that violates any other provision of this section.

(d) No person shall engage in phishing.

(e) A person who is not an authorized user who with actual knowledge, with conscious avoidance of actual knowledge, or willfully shall not cause computer software to be copied onto any computer in this state to carry out any of the violations described in subsections (a)-(d) of this section for a purpose wholly unrelated to any of the purposes of the software or service as described to the authorized user if the software is installed in an intentionally deceptive manner that:

(1) Exploits a security vulnerability in the computer; or

(2) Bundles the software with other software without providing prior notice to the authorized user of the name of the software and that the software will be installed on the computer.

(f) Any provision of a consumer contract that permits an intentionally deceptive practice prohibited under this section is not enforceable.

(g) This section shall not apply to any monitoring of, or interaction with, a subscriber's Internet or other network connection or service or a protected computer in accordance with the relationship or agreement between the owner of the computer or computer system used by the authorized user and a:

(1) Telecommunications or Internet service provider;

(2) Cable Internet provider;

(3) Computer hardware or software provider; or

(4) Provider of information service or interactive computer service for:

(A) Network or computer security purposes;

(B) Diagnostics;

(C) Technical support;

(D) Repair;

(E) Authorized updates of software or system firmware;

(F) Authorized remote system management;

(G) Network management or maintenance; or

(H) Detection or prevention of the unauthorized use or fraudulent or other illegal activities in connection with a network, service, or computer software, including scanning for and removing software proscribed under this subchapter.

(h) Notwithstanding any other provision of this chapter, the provisions of this chapter shall not apply to the installation of:

(1) Software that falls within the scope of a grant of authorization by an authorized user;

(2) An upgrade to a software program that has already been installed on the computer with the authorization of an authorized user; or

(3) Software before the first retail sale and delivery of the computer.

**History.** Acts 2005, No. 2255, § 1.

#### **4-111-104. Penalties.**

Any violation of this chapter is punishable by action of the Attorney General under the Deceptive Trade Practices Act, § 4-88-101 et seq.

**History.** Acts 2005, No. 2255, § 1.

#### **4-111-105. Use of Spyware Monitoring Fund.**

(a) All fines and penalties collected under § 4-111-104 shall be paid to the Treasurer of State for the benefit of the Spyware Monitoring Fund to be used by the Attorney General to:

(1) Investigate potential violations and enforce the provisions of this subchapter; and

(2) Establish and maintain a website to:

(A) Provide information concerning:

(i) The availability of computer software to combat spyware; and

(ii) False representations about the effectiveness of specific anti-spyware software;

(B) Promote consumer awareness about spyware, antispyware, and computer fraud;

(C) Educate consumers about:

(i) Spyware, computer fraud, and the effects of spyware and computer fraud upon consumer privacy and computer systems; and

(ii) How to access or obtain computer software to combat spyware; and

(D) Provide consumers with links to antispyware websites with helpful information.

(b) The Attorney General is authorized to request an appropriation from the fund to offset his or her salary and administrative expenses directly related to the enforcement of this subchapter and the administration of the website.

**History.** Acts 2005, No. 2255, § 1.

**Cross References.** Spyware Monitoring Fund, § 19-6-804.

## **CHAPTER 112**

# **ARKANSAS CONSUMER REPORT SECURITY FREEZE ACT**

#### **SECTION.**

4-112-101. Title.

4-112-102. Definitions.

4-112-103. Placement of security freeze.

#### **SECTION.**

4-112-104. Access to credit report — Notification of unauthorized access.

## SECTION.

- 4-112-105. Removal of security freeze.  
 4-112-106. Consumer request for removal of security freeze.  
 4-112-107. Exceptions.  
 4-112-108. Permissible fees — Exception.  
 4-112-109. Written confirmation.  
 4-112-110. Entities not required to place security freeze.

## SECTION.

- 4-112-111. Notice.  
 4-112-112. Civil action.  
 4-112-113. Enforcement — Penalties — Remedies.  
 4-112-114. No prohibition on advising third party that security freeze is in effect.

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**Effective Dates.** Acts 2007, No. 391, § 2: Jan. 1, 2008. Effective date clause provided: “This act takes effect January 1, 2008.”

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### 4-112-101. Title.

This chapter shall be known and may be cited as the “Arkansas Consumer Report Security Freeze Act”.

**History.** Acts 2007, No. 391, § 1; 2009, No. 223, § 1.

**Effective Dates.** Acts 2007, No. 391, § 2: Jan. 1, 2008.

**Amendments.** The 2009 amendment made no apparent change to the section.

### 4-112-102. Definitions.

As used in this chapter:

- (1) “Consumer” means an individual;
- (2) “Consumer report” means the same as defined in 15 U.S.C. § 1681a(d) as it existed on January 1, 2009;
- (3) “Consumer reporting agency” means the same as defined in 15 U.S.C. § 1681a(f) as it existed on January 1, 2009;
- (4) “Credit report” means a consumer report that a consumer reporting agency furnishes to a person that it has reason to believe intends to use the consumer report as a factor in establishing the consumer’s eligibility for credit to be used primarily for personal, family, or household purposes;
- (5) “Proper identification” means the same as defined in 15 U.S.C. § 1681h(a)(1) as it existed on January 1, 2009;
- (6) “Security freeze” means a notice placed in a credit report of a consumer at the request of the consumer that prohibits a consumer reporting agency from releasing the credit report or credit score of the consumer in response to a request to open a new account or to extend credit; and
- (7)(A) “Victim of identity theft” means a consumer who supplies to a consumer reporting agency in conjunction with a request for a security freeze a copy of a valid investigative report, an incident report, or a complaint with a law enforcement agency alleging the

unlawful use of the consumer's identifying information by another person.

(B) The copy of the valid investigative report, the incident report, or the complaint with a law enforcement agency may be transmitted to the consumer reporting agency by mail or secure electronic connection or secure electronic mail connection if the connection is made available by the consumer reporting agency.

**History.** Acts 2007, No. 391, § 1; 2009, No. 223, § 1.

**Amendments.** The 2009 amendment rewrote (1); substituted "2009" for "2007" in (2), (3), and (5); inserted (4) and redesignated the remaining subdivisions ac-

cordingly; substituted "credit report" for "consumer report" twice in (6); added (7); and made related changes.

**Effective Dates.** Acts 2007, No. 391, § 2; Jan. 1, 2008.

#### **4-112-103. Placement of security freeze.**

(a) A consumer may request that a security freeze be placed on his or her consumer report by:

(1) Sending his or her request in writing by mail to a consumer reporting agency;

(2) Telephoning his or her request to a consumer reporting agency and providing over the telephone proper identification or certain personal identification information required by the consumer reporting agency; or

(3) Electronically forwarding his or her request to a consumer reporting agency through a secure electronic connection or a secure electronic mail connection if the connection is made available by the consumer reporting agency.

(b) A consumer reporting agency shall place a security freeze on a credit report of a consumer no later than three (3) business days after receiving from the consumer:

(1) A request as provided in subsection (a) of this section;

(2) Proper identification; and

(3) Payment of the required fee, if applicable.

(c) Within five (5) business days of the receipt of the information and any applicable fees under subsection (b) of this section, the consumer reporting agency shall:

(1) Send a written confirmation of the placement of the security freeze to the consumer; and

(2) Provide the consumer with a unique personal identification number or password to be used by the consumer when providing authorization for the release of his or her credit report for a specific period of time.

(d) At the time a consumer requests a security freeze, the consumer reporting agency shall disclose the process:

(1) Of placing a security freeze and temporarily lifting a security freeze; and

(2) For allowing access to information from the credit report of the consumer for a period of time while the security freeze is in place.

**History.** Acts 2007, No. 391, § 1; 2009, No. 223, § 1.

**Effective Dates.** Acts 2007, No. 391, § 2: Jan. 1, 2008.

**Amendments.** The 2009 amendment rewrote the section.

#### **4-112-104. Access to credit report — Notification of unauthorized access.**

(a) If the consumer wishes to allow his or her credit report to be accessed for a specific period of time while a security freeze is in place, he or she shall contact the consumer reporting agency using a method of contact designated by the consumer reporting agency requesting that the security freeze be temporarily lifted and providing, to complete the request, all of the following:

- (1) Proper identification;
- (2) The unique personal identification number or password provided by the consumer reporting agency under § 4-112-103(c); and
- (3) The proper information regarding the time period for which the credit report shall be available to users of the credit report.

(b)(1) Except as provided in subdivision (b)(2) of this section, a consumer reporting agency that receives a request in compliance with subsection (a) of this section from a consumer to temporarily lift a security freeze on his or her credit report accompanied by all of the items listed in subsection (a) of this section shall comply with the request no later than:

(A) Three (3) business days after receiving the completed request by mail; or

(B) Fifteen (15) minutes after receiving the completed request by:

- (i) Telephone;
- (ii) Secure electronic connection; or
- (iii) Secure electronic mail connection.

(2) A consumer reporting agency may temporarily lift a security freeze as soon as the circumstances reasonably permit during normal business hours if the consumer reporting agency's ability to temporarily lift the security freeze within fifteen (15) minutes is prevented by:

(A) An act of God, including without limitation a fire, an earthquake, a hurricane, a storm, or a similar natural disaster or phenomenon;

(B) An unauthorized or illegal act by a third party, including without limitation terrorism, sabotage, riot, vandalism, a labor strike or dispute disrupting operations, or a similar occurrence;

(C) An operational interruption, including without limitation electrical failure, an unanticipated delay in the delivery of equipment or a replacement part, a computer hardware or software failure inhibiting response time, or a similar disruption;

(D) Governmental action, including without limitation an emergency order or regulation, a judicial or law enforcement action, or a similar directive;

(E) Regularly scheduled maintenance or updates during other than normal business hours to the consumer reporting agency's computer systems;

(F) Commercially reasonable maintenance or repair to the consumer reporting agency's systems if the maintenance or repair is unexpected or unscheduled; or

(G) The receipt of a removal request outside of normal business hours.

(c) A consumer reporting agency may develop procedures involving the use of telephone, the Internet, or other electronic media to receive and process a request from a consumer to temporarily lift a security freeze on a credit report under subsection (a) of this section in an expedited manner.

(d) If in connection with an application for credit or any other use a third party requests access to a credit report on which a security freeze is in effect and the consumer does not allow his or her credit report to be accessed for that period of time, the third party may treat the application as incomplete.

(e) If a consumer reporting agency grants unauthorized access to a consumer's credit report, then within three (3) days of learning that unauthorized access to the credit report has been granted, the consumer reporting agency shall send notice to the consumer that unauthorized access has been granted for each time unauthorized access was granted.

**History.** Acts 2007, No. 391, § 1; 2009, No. 223, § 1.

**Amendments.** The 2009 amendment, in (a), substituted "credit report" for "consumer report" once in the introductory language and twice in (a)(3), and deleted (a)(4), which read: "The required fee, if

applicable"; rewrote (b); in (c), deleted "facsimile" following "telephone," and substituted "credit report" for "consumer report"; added (d) and (e); and made related and minor stylistic changes.

**Effective Dates.** Acts 2007, No. 391, § 2: Jan. 1, 2008.

#### 4-112-105. Removal of security freeze.

(a) A consumer reporting agency shall remove or temporarily lift a security freeze placed on the credit report of a consumer in the following cases:

(1) Upon the consumer's request under § 4-112-104 or § 4-112-106; or

(2) If the credit report of the consumer was frozen due to a material misrepresentation of fact by the consumer.

(b) If a consumer reporting agency intends to remove a security freeze upon a credit report of a consumer and is not doing so at the request of the consumer, the consumer reporting agency shall notify the consumer in writing at least three (3) business days before removing the security freeze on the credit report of the consumer.

**History.** Acts 2007, No. 391, § 1; 2009, No. 223, § 1.

**Amendments.** The 2009 amendment deleted (b) and redesignated (a) as (a) and

(b); substituted “credit report” for “consumer report” throughout the section; and substituted “at least three (3) business days before” for “prior to” in (b).

**Effective Dates.** Acts 2007, No. 391, § 2: Jan. 1, 2008.

#### **4-112-106. Consumer request for removal of security freeze.**

(a)(1) A security freeze shall remain in place until the consumer requests that the security freeze be removed using a method of contact designated by the consumer reporting agency.

(2) A consumer reporting agency shall remove a security freeze within three (3) business days of receiving a request for removal under subdivision (a)(1) of this section from a consumer who provides with the request:

(A) Proper identification; and

(B) The unique personal identification number or password provided by the consumer reporting agency under § 4-112-103(c)(2).

(b) A consumer reporting agency shall require proper identification of the consumer making a request to place or remove a security freeze.

**History.** Acts 2007, No. 391, § 1; 2009, No. 223, § 1.

quired fee, if applicable,” and made related changes.

**Amendments.** The 2009 amendment deleted (a)(2)(C), which read: “The re-

**Effective Dates.** Acts 2007, No. 391, § 2: Jan. 1, 2008.

#### **4-112-107. Exceptions.**

(a) This chapter does not apply to the use of a credit report by any of the following:

(1)(A) A person or an entity, or a subsidiary, an affiliate, or an agent of that person or entity, or an assignee of a financial obligation owed by the consumer to that person or entity, or a prospective assignee of a financial obligation owed by the consumer to that person or entity in conjunction with the proposed purchase of the financial obligation, with which the consumer has or had prior to assignment an account or a contract including a demand deposit account, or to whom the consumer issued a negotiable instrument, for the purposes of reviewing the account or collecting the financial obligation owed for the account, contract, or negotiable instrument.

(B) As used in this subdivision (a)(1), “reviewing the account” includes activities related to account maintenance, monitoring, credit line increases, and account upgrades and enhancements;

(2) A subsidiary, an affiliate, an agent, an assignee, or a prospective assignee of a person or an entity to which access has been granted for purposes of facilitating the extension of credit or other permissible use;

(3) A state or local agency, law enforcement agency, trial court, or private collection agency acting under a court order, warrant, or subpoena;

(4) A child support agency acting under Title IV-D of the Social Security Act, 42 U.S.C. § 651 et seq., as it existed on January 1, 2009;

(5) The state or its agents or assigns acting to investigate fraud or acting to investigate or collect delinquent taxes or unpaid court orders or to fulfill any of its other constitutional or statutory responsibilities if such responsibilities are consistent with a permissible purpose under 15 U.S.C. § 1681b, as it existed on January 1, 2009;

(6) The use of credit information used for purposes permitted under 15 U.S.C. § 1681b(c), as it existed on January 1, 2009;

(7) Any person or entity administering a credit file monitoring subscription or similar service to which the consumer has subscribed;

(8) Any person or entity for the purpose of providing a consumer with a copy of his or her credit report or credit score upon the request of the consumer;

(9) Any person using the information in connection with the business of insurance; or

(10) A consumer reporting agency for its database or file that is used for one (1) or more of the following:

(A) Maintaining criminal records;

(B) Fraud prevention or detection;

(C) Maintaining personal loss history information; or

(D) Employment, tenant, or individual background screening.

**History.** Acts 2007, No. 391, § 1; 2009, No. 223, § 1.

**Amendments.** The 2009 amendment, in (a), deleted “consumer” following “use of a” in the introductory language, substituted “2009” for “2007” in (a)(4) and (a)(5), substituted “January 1, 2009” for “Janu-

ary 8, 2007” in (a)(6), substituted “credit report” for “consumer report” in (a)(8), substituted “agency for its” for “agencies”, and made minor stylistic changes.

**Effective Dates.** Acts 2007, No. 391, § 2: Jan. 1, 2008.

#### 4-112-108. Permissible fees — Exception.

(a) Except as provided in subsection (b) of this section, a consumer reporting agency may charge a consumer a fee of no more than five dollars (\$5.00) for the:

(1) Initial placement of a security freeze;

(2) Removal of a security freeze; or

(3) Temporary lifting of a security freeze for a period of time.

(b) A consumer reporting agency shall not charge a fee for the initial placement of a security freeze if requested by a consumer who is:

(1) At least sixty-five (65) years of age; or

(2) A victim of identity theft.

**History.** Acts 2007, No. 391, § 1; 2009, No. 223, § 1.

**Amendments.** The 2009 amendment added (b) and redesignated the remaining text; in (a), in the introductory language, inserted “Except as provided in subsection

(b) of this section” and substituted “five dollars (\$5.00)” for “ten dollars (\$10.00)”; and made related and minor stylistic changes.

**Effective Dates.** Acts 2007, No. 391, § 2: Jan. 1, 2008.

**4-112-109. Written confirmation.**

(a) If a security freeze is in place, a consumer reporting agency shall not change any of the following official information in a credit report without sending a written confirmation of the change to the consumer within thirty (30) days of posting the change to the file of the consumer:

- (1) Name;
- (2) Date of birth;
- (3) Social security number; and
- (4) Address.

(b)(1) Written confirmation is not required for technical modifications of official information of a consumer, including name and street abbreviations, complete spellings, or the transposition of numbers or letters.

(2) In the case of an address change, the written confirmation shall be sent to both the new address and to the former address.

**History.** Acts 2007, No. 391, § 1; 2009, No. 223, § 1.

**Effective Dates.** Acts 2007, No. 391, § 2: Jan. 1, 2008.

**Amendments.** The 2009 amendment substituted “credit report” for “consumer report” in (a).

**4-112-110. Entities not required to place security freeze.**

The following entities are not required to place a security freeze on a credit report:

(1)(A) A consumer reporting agency that acts only as a reseller of credit information by assembling and merging information contained in the database of another consumer reporting agency or multiple consumer reporting agencies and does not maintain a permanent database of credit information from which new credit reports are produced.

(B) However, a consumer reporting agency acting as a reseller shall honor any security freeze placed on a credit report by another consumer reporting agency;

(2) A check services or fraud prevention services company that issues reports on incidents of fraud or authorizations for the purpose of approving or processing negotiable instruments, electronic funds transfers, or similar methods of payments; or

(3) A deposit account information service company that issues reports regarding account closures due to fraud, substantial overdrafts, automatic teller machine abuse, or similar negative information regarding a consumer to inquiring banks or other financial institutions for use only in reviewing a consumer request for a deposit account at the inquiring bank or financial institution.

**History.** Acts 2007, No. 391, § 1; 2009, No. 223, § 1.

**Amendments.** The 2009 amendment substituted “credit” for “consumer” in the

introductory language, (1)(A), and (1)(B).

**Effective Dates.** Acts 2007, No. 391,  
§ 2: Jan. 1, 2008.

#### **4-112-111. Notice.**

At any time that a consumer is required to receive a summary of rights required under 15 U.S.C. § 1681g(c), as it existed on January 1, 2009, the following notice shall be included:

**“Arkansas Consumers Have the Right to Obtain a Security Freeze.**

You have the right to place a “security freeze” on your credit report, which will prohibit a consumer reporting agency from releasing information in your credit report without your express authorization. The security freeze is designed to prevent credit, loans, and services from being approved in your name without your consent. However, you should be aware that using a security freeze to take control over who gets access to the personal and financial information in your credit report may delay, interfere with, or prohibit the timely approval of any subsequent request or application you make regarding a new loan, credit, mortgage, government services or payments, rental housing, employment, investment, license, cellular phone, utilities, digital signature, Internet credit card transaction, or other services, including an extension of credit at point of sale.

When you place a security freeze on your credit report, you will be provided a personal identification number or password to use if you choose to remove the security freeze on your credit report or authorize the release of your credit report for a period of time after the security freeze is in place. To provide that authorization you must contact the consumer reporting agency by one (1) of the methods that it requires and provide all of the following:

- (1) Your personal identification number or password;
- (2) Proper identification to verify your identity; and
- (3) The proper information regarding the period of time for which the credit report shall be available.

A consumer reporting agency must authorize the release of your credit report for a period of time within fifteen (15) minutes or as soon as practical if good cause exists for the delay, and must remove a security freeze no later than three (3) business days after receiving all of the above items by any method that the consumer reporting agency allows. A security freeze does not apply to a person or an entity, or its affiliates, or collection agencies acting on behalf of the person or entity with which you have an existing account that requests information in your credit report for the purposes of reviewing or collecting the account. Reviewing the account includes activities related to account maintenance, monitoring, credit line increases, and account upgrades and enhancements.

You have a right to bring a civil action against anyone, including a consumer reporting agency, that willfully or negligently fails to comply with any requirement of the Arkansas Consumer Report Security Freeze Act.

A consumer reporting agency has the right to charge you up to five dollars (\$5.00) to place a security freeze on your credit report, to temporarily lift a security freeze on your credit report, or to remove a security freeze from your credit report. However, you shall not be charged any fee if you are at least sixty-five (65) years of age or if you are a victim of identity theft and have submitted, in conjunction with the security freeze request, a copy of a valid investigative report or incident report or complaint with a law enforcement agency alleging the unlawful use of your identifying information by another person.”

**History.** Acts 2007, No. 391, § 1; 2009, No. 223, § 1.

**Amendments.** The 2009 amendment substituted “2009” for “2007” in the introductory language; deleted the second sentence of first paragraph of the notice, which read: “A security freeze must be requested in writing by certified mail”; in the third paragraph of the notice, substituted “credit report” for “consumer report” and deleted former subdivision (4), which

read: “Payment of the appropriate fee, if any”; inserted “for a period of time within fifteen (15) minutes or as soon as practical if good cause exists for the delay, and must remove a security freeze” in the third paragraph of the notice; rewrote the last paragraph of the notice; and made related and minor stylistic changes.

**Effective Dates.** Acts 2007, No. 391, § 2; Jan. 1, 2008.

#### 4-112-112. Civil action.

(a) Any person or entity that willfully fails to comply with any requirement imposed under this chapter with respect to any consumer is liable to that consumer in an amount equal to the sum of:

(1) Any actual damages sustained by the consumer; and

(2) In the case of any successful action to enforce any liability under this chapter, the costs of the action together with reasonable attorney’s fees as determined by the court.

(b) Any person or entity that obtains a credit report, requests a security freeze, or requests the temporary lift of a security freeze or the removal of a security freeze from a consumer reporting agency under false pretenses or in an attempt to violate federal or state law is liable to the consumer reporting agency for actual damages sustained by the consumer reporting agency or one thousand dollars (\$1,000), whichever is greater.

(c) Any person or entity that is negligent in failing to comply with any requirement imposed under this chapter with respect to any consumer is liable to that consumer in an amount equal to the sum of:

(1) Any actual damages sustained by the consumer as a result of the failure; and

(2) In the case of any successful action to enforce any liability under this chapter, the costs of the action together with reasonable attorney’s fees as determined by the court.

(d) Upon a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this chapter was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party reasonable attorney’s fees in

relation to the work expended in responding to the pleading, motion, or other paper.

**History.** Acts 2007, No. 391, § 1; 2009, No. 223, § 1. **Effective Dates.** Acts 2007, No. 391, § 2: Jan. 1, 2008.

**Amendments.** The 2009 amendment substituted “credit report” for “consumer report” in (b).

**4-112-113. Enforcement — Penalties — Remedies.**

(a) A violation of this chapter constitutes an unfair act or practice or a deceptive act or practice under § 4-88-101 et seq. pertaining to deceptive trade practices.

(b)(1) All remedies, penalties, and authority granted to the Attorney General under § 4-88-101 et seq. shall be available to the Attorney General for enforcement of this chapter.

(2) The remedies and penalties provided by this section are cumulative to each other and the remedies or penalties available under all other laws of this state.

**History.** Acts 2007, No. 391, § 1; 2009, No. 223, § 1. **Effective Dates.** Acts 2007, No. 391, § 2: Jan. 1, 2008.

**Amendments.** The 2009 amendment made no apparent changes to the section.

**4-112-114. No prohibition on advising third party that security freeze is in effect.**

This chapter does not prohibit a consumer reporting agency from advising a third party that a security freeze is in effect with respect to the credit report of a consumer.

**History.** Acts 2009, No. 223, § 1.

**CHAPTER 113**

**CONNECT ARKANSAS BROADBAND PROGRAM**

SECTION.

- 4-113-101. Short title.
- 4-113-102. Definitions.
- 4-113-103. Connect Arkansas — Non-profit organization — Purposes — Grants.
- 4-113-104. Creation of the Arkansas Broadband Council.
- 4-113-105. Broadband service registration.

SECTION.

- 4-113-106. Legislative findings — Critical infrastructure — Priority of county economic development plans that include regional broadband collaboration.

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**Effective Dates.** Acts 2009, No. 947, § 5: April 6, 2009. Emergency clause provided: “It is found and determined by the General Assembly of the State of Arkan-

that there is a great need to improve technology in underdeveloped areas of the state; that opportunities for funding and providing technology to these areas should be made available as soon as possible; and that this act improves the ability of the state to improve the technology to rural Arkansas and other underdeveloped areas of the state to address the health, economic, educational, technology and other needs of these areas. Therefore, an emergency is declared to exist and this

act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

#### 4-113-101. Short title.

This chapter shall be known and may be cited as the "Connect Arkansas Broadband Act".

**History.** Acts 2007, No. 604, § 1.

#### 4-113-102. Definitions.

As used in this chapter:

(1) "Broadband" means any service used to provide Internet access at a minimum speed that is the greater of:

(A) Seven hundred sixty-eight kilobites per second (768 kbps) in at least one (1) direction; or

(B) The minimum speed for broadband as defined by regulations of the Federal Communications Commission as of January 1, 2009, or as of a later date if adopted by rule of the Arkansas Broadband Council;

(2) "Broadband backbone" means the collection of high-capacity broadband infrastructure used to deliver broadband service to communities, counties, or regions of the State of Arkansas;

(3) "Last mile broadband" means the broadband media used to deliver broadband to a user location such as a home or an office building; and

(4) "Participants" means the employees of Connect Arkansas and all entities participating in Connect Arkansas programs to facilitate the preparation of the people and businesses of Arkansas for the use of broadband and to facilitate the deployment of broadband service to individual and organizational consumers in Arkansas.

**History.** Acts 2007, No. 604, § 1; 2009, No. 947, § 1.

**Amendments.** The 2009 amendment rewrote (1).

#### **4-113-103. Connect Arkansas — Nonprofit organization — Purposes — Grants.**

(a) The Arkansas Capital Corporation may form a nonprofit corporation named “Connect Arkansas” to:

(1) Prepare the people and businesses of Arkansas to secure the economic, educational, health, social, and other benefits available via broadband use;

(2) Facilitate the availability of broadband service to every home and business in Arkansas;

(3) Promote broadband-based development in Arkansas, with the goals of facilitating:

(A) Broadband education so that the citizens of every home and business in Arkansas can take full advantage of broadband services; and

(B) The availability of broadband service to broadband-educated citizens in every home and business in Arkansas by the end of the year 2012; and

(4)(A) Recognize that services such as geographical information system data delivery and high-definition television programs require increasingly huge demands in bandwidth; and

(B) Promote broadband backbone networks that will serve all of Arkansas with the bandwidth to support Arkansas home and business needs into the foreseeable future.

(b) The Governor, and with the consent of the Governor, the Arkansas Economic Development Commission, the Arkansas Science and Technology Authority, and any other state entity may make grants available for the purpose of supporting Connect Arkansas.

**History.** Acts 2007, No. 604, § 1; 2009, No. 947, § 2; 2011, No. 719, § 5.

**Amendments.** The 2009 amendment rewrote (b), redesignated (c) and (d) as (a)(3) and (a)(4), and made related and minor stylistic changes.

The 2011 amendment created (a)(4)(A), deleted “recognizing” and replaced with

“recognized”, and replaced “such services as” with “services such as”, and deleted the phrase “promote broadband backbone networks that will serve all of Arkansas with the bandwidth to support Arkansas home and business needs into the foreseeable future” and reinserted the deleted language in (a)(4)(B).

#### **4-113-104. Creation of the Arkansas Broadband Council.**

(a) The Arkansas Broadband Council is created and shall:

(1) Monitor the broadband-based development efforts of other states and nations in areas such as business, education, and health;

(2) Receive input from all Arkansas broadband stakeholders and advise the Governor and the General Assembly on policies related to broadband in Arkansas;

(3) Serve as the broadband advocate to state agencies and other state entities to communicate the broadband needs of the citizens and organizations of the state that do not have access to broadband service or to broadband service adequate for their needs; and

(4) Have the authority to adopt by rule the minimum speed for the definition of “broadband” under § 4-113-102(1) that is provided by the regulations of the Federal Communications Commission.

(b) The council shall include:

(1) One (1) representative from each broadband provider association that exists in the state on July 31, 2007, including without limitation the Arkansas Cable Telecommunications Association and the Arkansas Telecommunications Association;

(2) Three (3) members to be appointed by the Governor;

(3) Three (3) members to be appointed by the President Pro Tempore of the Senate;

(4) Three (3) members to be appointed by the Speaker of the House of Representatives; and

(5) The President of the Arkansas Science and Technology Authority or his or her designee who shall serve as an ex officio member of the council.

(c) The council shall provide:

(1) A written biennial report to the Governor and the General Assembly; and

(2) Interim reports as requested by the Governor or the General Assembly.

**History.** Acts 2007, No. 604, § 1; 2009, No. 947, § 3; 2011, No. 599, § 1.

**Amendments.** The 2009 amendment, in (a), deleted “Advisory” following “Broadband” in the introductory language, in (a)(2) inserted “Receive input from all Arkansas broadband stakehold-

ers and,” substituted “broadband in Arkansas” for “making affordable broadband available to every Arkansas home and business,” and inserted (a)(3) and (a)(4); inserted (b)(5); and made related and minor stylistic changes.

The 2011 amendment rewrote (c).

#### **4-113-105. Broadband service registration.**

(a) Connect Arkansas will establish a method for broadband service providers to register areas in which they provide broadband service to enable Connect Arkansas to target locations where broadband is not currently offered to Arkansas homes and businesses.

(b) Specific registration requirements will be established by Connect Arkansas, but competitive provider information shall be kept confidential by Connect Arkansas.

(c) Connect Arkansas shall execute nondisclosure agreements with providers to guarantee confidentiality.

(d) Connect Arkansas may disclose areas that are registered, the types of broadband available in registered areas, and any provider information that the provider identifies as acceptable for disclosure.

(e) Registered areas are subject to verification by Connect Arkansas and by the affected counties, but competitive service provider information shall not be released outside of Connect Arkansas.

**History.** Acts 2007, No. 604, § 1.

**4-113-106. Legislative findings — Critical infrastructure — Priority of county economic development plans that include regional broadband collaboration.**

(a) The General Assembly finds that:

(1) Broadband is:

(A) Critical infrastructure to the State of Arkansas; and

(B) Essential to:

(i) The fundamental activities of an advanced society including education, economic development, health, the pursuit of science and technology, and the conduct of government at all levels; and

(ii) Obtaining economic and educational equality among the different counties and regions of Arkansas;

(2) As a critical infrastructure:

(A) The first phase of the statewide broadband effort must be to make broadband accessible to every individual and organization in Arkansas; and

(B) The second phase of the statewide broadband effort must be to establish Arkansas as a leader in the leveraging of broadband in support of the activities essential to an advanced society; and

(3) The inclusion of broadband in state and county economic development plans should be encouraged.

(b) State activities in support of county economic development plans shall give priority to county economic development plans that include regional broadband collaborations to assist in situations in which counties cannot independently establish broadband.

**History.** Acts 2009, No. 947, § 4.

**CHAPTER 114**

**SERVICE CONTRACTS ACT**

**SECTION.**

4-114-101. Title.

4-114-102. Scope and purpose.

4-114-103. Definitions.

4-114-104. Requirements for doing business.

4-114-105. Required disclosures — Reimbursement insurance policy.

4-114-106. Required disclosure — Service contracts.

**SECTION.**

4-114-107. Prohibited acts.

4-114-108. Recordkeeping requirements.

4-114-109. Cancellation of reimbursement insurance policy.

4-114-110. Obligation of reimbursement insurance policy insurers.

4-114-111. Enforcement provisions.

4-114-112. Rules.

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**A.C.R.C. Notes.** Acts 2007, No. 656, § 1, provided: "Effective date — Exception. This chapter shall become effective and apply to all service contracts issued on or after October 1, 2007. However, a

provider engaged in the service contract business in this state on or before the effective date of this chapter that submits an application for registration as a provider under this chapter within thirty (30)

days after the Insurance Commissioner makes the application available may continue to engage in business as a provider in this state until final agency action is

taken by the commissioner regarding the registration application and all rights to administrative judicial review have been exhausted or have expired.”

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#### **4-114-101. Title.**

This chapter shall be known and may be cited as the “Service Contracts Act”.

**History.** Acts 2007, No. 656, § 1.

#### **4-114-102. Scope and purpose.**

(a) The purpose of this chapter is to:

(1) Create a legal framework within which service contracts are defined, may be sold, and are regulated in this state;

(2) Add significant consumer protections; and

(3) Eliminate unnecessary administration.

(b) A service contract under § 4-114-103 is not insurance and is not subject to the Arkansas Insurance Code.

(c) This chapter does not apply to:

(1) Warranties;

(2) Maintenance agreements;

(3) Commercial transactions;

(4) A person or entity or the affiliate of a person or entity licensed or certificated by the Arkansas Public Service Commission or the Federal Communications Commission with respect to warranties, service contracts, or maintenance agreements covering wiring, transmission devices, equipment, or services offered or provided by the person, entity, or affiliate to its customers;

(5) Service contracts sold or offered for sale to persons other than consumers;

(6) Motor vehicle service contracts as defined in and regulated pursuant to the Motor Vehicle Service Contract Act, § 4-90-501 et seq.; or

(7) Mechanical breakdown insurance.

(d) Manufacturer’s service contracts on the manufacturer’s products are subject only to §§ 4-114-106(a), 4-114-106(d)-(g), 4-114-107, and 4-114-111.

(e) Other than mechanical breakdown insurance, the types of agreements referred to in subsections (c) and (d) of this section and service contracts governed under this chapter are not insurance and are not subject to compliance with any provision of the insurance laws of this state.

**History.** Acts 2007, No. 656, § 1.

**4-114-103. Definitions.**

As used in this chapter:

(1) “Administrator” means the person who is responsible for the administration of a service contract;

(2) “Consumer” means an individual who buys other than for purposes of resale any tangible personal property that is distributed in commerce and that is normally used for personal, family, or household purposes and not for business or resale purposes;

(3) “Maintenance agreement” means a contract of limited duration that provides for scheduled maintenance only;

(4) “Manufacturer” means a person that:

(A) Manufactures or produces property and sells the property under its own name or label;

(B) Is a wholly owned subsidiary of the person that manufactures or produces that property;

(C) Is a corporation that owns one hundred percent (100%) of the person that manufactures or produces the property;

(D) Does not manufacture or produce the property, but the property is sold under its trade name label;

(E) Manufactures or produces the property, and the property is sold under the trade name or label of another person; or

(F) Does not manufacture or produce the property but licenses the use of its trade name or label under a written contract with another person that sells the property under the licensor’s trade name or label;

(5) “Mechanical breakdown insurance” means a policy, a contract, or an agreement issued by an authorized insurer that provides for the repair, replacement, or maintenance of property or indemnification for repair, replacement, or service for the operations or structural failure of the property due to a defect in materials or workmanship or to normal wear and tear;

(6) “Nonoriginal manufacturer’s parts” means replacement parts not made for or by the original manufacturer of the property, commonly referred to as “after market parts”;

(7) “Person” means an individual, a partnership, a corporation, an incorporated or unincorporated association, a joint stock company, a reciprocal, a syndicate, or any similar entity or combination of entities acting in concert;

(8) “Premium” means the consideration paid to an insurer for a reimbursement insurance policy;

(9) “Provider” means a person that is contractually obligated to the service contract holder under the terms of the service contract;

(10) “Provider fee” means the consideration paid for a service contract;

(11) “Reimbursement insurance policy” means a policy of insurance issued to a provider to either:

(A) Provide reimbursement to the provider under the terms of the insured service contracts issued or sold by the provider; or

(B) In the event of the provider's nonperformance, to pay on behalf of the provider all covered contractual obligations incurred by the provider under the terms of the insured service contracts issued or sold by the provider;

(12)(A) "Service contract" means a contract or an agreement for a separately stated consideration and for a specific duration to perform the service, repair, replacement, or maintenance of property or indemnification for service, repair, replacement, or maintenance for the operational or structural failure of property due to a defect in materials, workmanship, or normal wear and tear, with or without additional provision for incidental payment of indemnity under limited circumstances, including without limitation unavailability of parts, obsolescence, food spoilage, rental, or shipping.

(B) "Service contract" does not include mechanical breakdown insurance or maintenance agreements.

(C) A service contract may provide for the repair, replacement, or maintenance of property for damage resulting from power surges or accidental damage from handling.

(D) A service contract is not insurance in this state or otherwise regulated under the Arkansas Insurance Code;

(13) "Service contract holder" means a person that is the purchaser or holder of a service contract; and

(14) "Warranty" means a warranty made solely by the manufacturer, importer, or seller of property or services without charge that:

(A) Is not negotiated or separated from the sale of the product;

(B) Is incidental to the sale of the product; and

(C) Guarantees indemnity for defective parts, mechanical breakdown, or electrical breakdown and labor or other remedial measures, such as repair or replacement of the property or repetition of services.

**History.** Acts 2007, No. 656, § 1.

#### **4-114-104. Requirements for doing business.**

(a) A provider may appoint an administrator or other designee to be responsible for all or part of the administration of service contracts and compliance with this chapter.

(b) Service contracts shall not be issued, sold, or offered for sale in this state unless the provider or its designee has:

(1) Provided a receipt or other written evidence of the purchase of the service contract to the contract holder;

(2) Provided a copy of the service contract to the service contract holder within a reasonable period of time from the date of purchase; and

(3) Complied with this chapter.

(c)(1) Each provider of service contracts sold in this state shall file a registration with the Insurance Commissioner consisting of its name, full corporate address, telephone number and contact person, evidence of compliance with subsection (d) of this section, a designation of a

person in this state for service of process, and any other information required to be submitted by rule of the Insurance Commissioner.

(2) Each provider shall pay to the commissioner a fee in the amount of two hundred dollars (\$200) upon initial registration and every year thereafter.

(3) The registration shall be updated by written notification to the commissioner if material changes occur in the registration.

(d) In order to assure the faithful performance of a provider's obligations to its contract holders, each provider that is contractually obligated to provide service under a service contract shall:

(1) Insure all service contracts under a reimbursement insurance policy issued by an insurer licensed, registered, or authorized to transact insurance in this state or a surplus lines insurer that is authorized under § 23-65-310 and maintains statutory capital and surplus of at least fifteen million dollars (\$15,000,000) at all times while the reimbursement insurance policy is in force;

(2) Do both of the following:

(A)(i) Maintain a funded reserve account for its obligations under its contracts issued and outstanding in this state.

(ii) The reserves shall not be less than forty percent (40%) of gross consideration received less claims paid on the sale of all unexpired service contracts.

(iii) The reserve account shall be subject to examination and review by the commissioner; and

(B) Place in trust with the commissioner a financial security deposit having a value of not less than five percent (5%) of the gross consideration received less claims paid on the sale of all unexpired service contracts, but not less than twenty-five thousand dollars (\$25,000), consisting of a surety bond issued by an authorized surety; or

(3)(A) Maintain a net worth of one hundred million dollars (\$100,000,000) on its own or together with its parent company if the parent company executes a parental guarantee in a form acceptable to the commissioner.

(B) Upon request, the provider shall provide the commissioner with a copy of the provider's financial statements or, if the provider's financial statements are consolidated with those of its parent company, the provider's parent company's most recent Form 10-K or Form 20-F filed with the United States Securities and Exchange Commission within the last calendar year, or if the company does not file with the United States Securities and Exchange Commission, a copy of the company's audited financial statements, which shows an independent net worth of the provider or its parent company of at least one hundred million dollars (\$100,000,000).

(C) If the provider's parent company's Form 10-K, Form 20-F, or audited financial statements are filed to meet the provider's financial stability requirement, then the parent company shall agree to guarantee the obligations of the obligor relating to service contracts sold by the provider in this state.

(e) Except for the requirements specified in subsection (d) of this section, no other financial security requirements shall be required by the commissioner for a provider.

(f)(1) Provider fees collected on service contracts shall not be subject to premium taxes.

(2) Premiums for reimbursement insurance policies shall be subject to applicable taxes.

(g) Except for the registration requirements in subsection (c) of this section, persons marketing, selling, or offering to sell service contracts for providers that comply with this chapter are exempt from this state's licensing requirements.

(h) Providers complying with this chapter are not required to comply with other provisions of the Arkansas Insurance Code.

**History.** Acts 2007, No. 656, § 1; 2009, (d)(2), redesignated (d)(2), (d)(3), and No. 726, § 2. (d)(4), and inserted the first instance of

**Amendments.** The 2009 amendment inserted "Do both of the following" in "financial statements" in (d)(3)(B).

#### **4-114-105. Required disclosures — Reimbursement insurance policy.**

(a) Reimbursement insurance policies insuring service contracts issued, sold, or offered for sale in this state shall state that the insurer that issued the reimbursement insurance policy shall:

(1) Reimburse or pay on behalf of the provider any covered sums the provider is legally obligated to pay; or

(2) In the event of the provider's nonperformance, shall provide the service that the provider is legally obligated to perform according to the provider's contractual obligations under the service contracts issued or sold by the provider.

(b) In the event covered service is not provided by the provider within sixty (60) days of proof of loss by the service contract holder, the service contract holder is entitled to apply directly to the reimbursement insurance company.

**History.** Acts 2007, No. 656, § 1.

#### **4-114-106. Required disclosure — Service contracts.**

(a) A service contract issued, sold, or offered for sale in this state shall:

(1) Be written in clear, understandable language that is easy to read; and

(2) Conspicuously disclose the applicable requirements of this section.

(b)(1) A service contract insured under a reimbursement insurance policy under § 4-114-104(d)(1) shall contain the name and address of the insurer and a statement in substantially the following form: "Obligations of the provider under this service contract are guaranteed

under a service contract reimbursement insurance policy. If the provider fails to pay or provide service on a claim within sixty (60) days after proof of loss has been filed, the service contract holder is entitled to make a claim directly against the insurance company.”

(2) A claim against the provider may include a claim for return of the unearned provider fee.

(c)(1) A service contract not insured under a reimbursement insurance policy under § 4-114-104(d)(1) shall conspicuously state the name and address of the provider and contain a statement in substantially the following form: “Obligations of the provider under this service contract are backed only by the full faith and credit of the provider (issuer) and are not guaranteed under a service contract reimbursement insurance policy.”

(2) A claim against the provider shall also include a claim for return of the unearned provider fee.

(d) A service contract shall identify the administrator, the provider obligated to perform the service under the contract, the service contract seller, and the service contract holder to the extent that the name and address of the service contract holder have been furnished by the service contract holder.

(e)(1) A service contract or a service contract holder’s receipt shall state the total purchase price and the terms under which the service contract is sold.

(2) The purchase price is not required to be preprinted on the service contract and may be negotiated at the time of sale with the service contract holder.

(f) If prior approval of repair work is required, a service contract shall state the procedure for obtaining prior approval and for making a claim, including a toll-free telephone number for claim service and a procedure for obtaining emergency repairs performed outside of normal business hours.

(g) A service contract shall:

(1) Disclose the deductible amount;

(2) Specify the merchandise and services to be provided and any limitations, exceptions, or exclusions;

(3)(A) State the conditions upon which the use of the nonoriginal manufacturer’s parts or substitute service may be allowed.

(B) Conditions stated shall comply with applicable state and federal laws;

(4) State any terms, restrictions, or conditions governing the transferability of the service contract;

(5)(A) State the terms, restrictions, or conditions governing termination of the service contract by the service contract holder.

(B)(i) The provider of the service contract shall mail a written notice to the contract holder within fifteen (15) days of the date of termination in the event the provider terminates the service contract.

(ii) Prior notice is not required if the reason for cancellation is nonpayment of the provider fee, a material misrepresentation by the

service contract holder to the provider, or a substantial breach of duties by the service contract holder relating to the covered product or its use.

(C) The notice shall state the effective date of the cancellation and the reason for the cancellation.

(D) A pro rata refund of the unearned portion of the provider fee less the amount or value of any claims paid shall accompany the notice unless cancellation is for nonpayment;

(6)(A) Require every provider to permit the service contract holder to return the contract within no less than twenty (20) days of the date of mailing of the service contract or no less than ten (10) days if the service contract is delivered at the time of sale or within a longer time period permitted under the service contract.

(B) If no claim has been made under the service contract, the service contract is void and the provider shall refund to the service contract holder the full purchase price of the service contract.

(C) A ten percent (10%) penalty per month shall be added to a refund that is not paid within forty-five (45) days of return of the service contract to the provider.

(D) The applicable free-look time period on service contracts shall only apply to the original service contract purchaser and only if no claim has been made prior to its return to the provider;

(7) Set forth all of the obligations and duties of the service contract holder, such as the duty to protect against any further damage and the requirement for certain service and maintenance; and

(8) Clearly state whether or not the service contract provides for or excludes consequential damages or preexisting conditions.

**History.** Acts 2007, No. 656, § 1.

#### **4-114-107. Prohibited acts.**

(a)(1) A provider shall not use a name:

(A) With the words “insurance”, “casualty”, “surety”, “mutual”, or any other words descriptive of the insurance, casualty, or surety business; or

(B) Deceptively similar to the name or description of any insurance or surety corporation or any other provider.

(2)(A) This subsection shall not apply to a company that was using any of the prohibited language in its name prior to October 1, 2007.

(B) However, a company using the prohibited language in its name shall conspicuously disclose in its service contracts that the service contract is not an insurance contract.

(b) A provider or its representative shall not in its service contracts or literature make or permit or cause to be made any false or misleading statement or deliberately omit any material statement that would be considered misleading if omitted in connection with the sale, offer to sell, or advertisement of a service contract.

(c) A person, including without limitation a bank, savings and loan association, lending institution, manufacturer, or seller of any product shall not require the purchase of a service contract as a condition of a loan or a condition for the sale of any property.

**History.** Acts 2007, No. 656, § 1.

#### **4-114-108. Recordkeeping requirements.**

(a)(1) A provider shall keep accurate accounts, books, and records concerning transactions regulated under this chapter.

(2) A provider's accounts, books, and records shall include:

(A) A copy of each type of service contract issued;

(B) The name and address of each service contract holder to the extent that the name and address have been furnished by the service contract holder;

(C) A list of the provider locations where service contracts are marketed, sold, or offered for sale; and

(D) Claims files containing at a minimum the dates, amounts, and description of all receipts, claims, and expenditures related to the service contracts.

(3) Except as provided in subsection (b) of this section, a provider shall retain all records pertaining to each service contract holder for at least three (3) years after the specified period of coverage has expired.

(4)(A) A provider may keep all records required under this chapter on a computer disk or other similar technology.

(B) If a provider maintains records in other than hard copy, records shall be accessible from a computer terminal available to the Insurance Commissioner and be capable of duplication to legible hard copy.

(b) A provider discontinuing business in this state shall maintain its records until it furnishes the commissioner satisfactory proof that it has discharged all obligations to service contract holders in this state.

(c) A provider shall make all accounts, books, and records concerning transactions regulated under this chapter or other pertinent laws available to the commissioner upon request.

(d) The books and records requirement of this section may be delegated by the provider to its administrator or other designee, but such delegation shall not relieve the provider of its obligations to have the books and records maintained and produced upon the commissioner's request.

**History.** Acts 2007, No. 656, § 1.

#### **4-114-109. Cancellation of reimbursement insurance policy.**

(a) An insurer that issued a reimbursement insurance policy shall not terminate the policy until at least sixty (60) days' notice of termination has been mailed or delivered to the Insurance Commissioner and in accordance with any other applicable law.

(b) The termination of a reimbursement insurance policy shall not reduce the insurer's responsibility for service contracts issued by providers prior to the date of the termination.

**History.** Acts 2007, No. 656, § 1.

#### **4-114-110. Obligation of reimbursement insurance policy insurers.**

(a)(1) A provider is considered to be the agent of the insurer that issued a reimbursement insurance policy for the purpose of obligating an insurer for the acts of its agents, including the collection of moneys not forwarded.

(2) If a provider is acting as an administrator and enlists other providers, the provider acting as the administrator shall notify the insurer of the existence and identities of the other providers.

(b) This chapter shall not prevent or limit the right of an insurer that issued a reimbursement insurance policy to seek indemnification or subrogation against a provider if the insurer pays or is obligated to pay a service contract holder sums that the provider was obligated to pay pursuant to the provisions of the service contract or under a contractual agreement.

**History.** Acts 2007, No. 656, § 1.

#### **4-114-111. Enforcement provisions.**

(a) The Insurance Commissioner may conduct investigations or examinations of providers, administrators, insurers, or other persons to enforce the provisions of this chapter and protect service contract holders in this state.

(b)(1) The commissioner may take any action that is necessary or appropriate to enforce the provisions of this chapter and the commissioner's rules and orders to protect service contract holders in this state.

(2) The commissioner may order a provider to cease and desist from committing violations of this chapter or the commissioner's rules or orders, may issue an order prohibiting a provider from selling or offering a service contract for sale, or may issue an order imposing a civil penalty, or any combination of these, if the provider has violated this chapter or the commissioner's rules or orders.

(3)(A) A person aggrieved by an order issued under this subsection may request a hearing before the commissioner by filing a request with the commissioner within twenty (20) days of the commissioner's order.

(B) Pending the hearing and the decision by the commissioner, the commissioner shall suspend the effective date of the order.

(C)(i) At the hearing, the burden shall be on the commissioner to show why the order is justified.

(ii) The provisions of § 23-61-301 et seq. shall apply to a hearing requested under this subsection.

(4)(A) The commissioner may bring an action in the Pulaski County Circuit Court for an injunction or other appropriate relief for threatened or existing violations of this chapter or of the commissioner's rules or orders.

(B) An action filed under subdivision (b)(3)(A) of this section may also seek restitution on behalf of persons aggrieved by a violation of this chapter or a rule or an order of the commissioner.

(5)(A) A person in violation of this chapter or a rule or an order of the commissioner may be assessed a civil penalty not to exceed five hundred dollars (\$500) per violation and no more than ten thousand dollars (\$10,000) in the aggregate for all violations of a similar nature.

(B) For purposes of this subdivision (b)(5), violations shall be of a similar nature if the violation consists of the same or similar course of conduct, action, or practice, irrespective of the number of times the act, conduct, or practice that is determined to be a violation of this chapter has occurred.

(c) The authority of the commissioner under this section is in addition to other authorities of the commissioner.

**History.** Acts 2007, No. 656, § 1.

#### **4-114-112. Rules.**

The Insurance Commissioner may promulgate rules necessary to effectuate this chapter.

**History.** Acts 2007, No. 656, § 1.

## **CHAPTER 115**

### **CREDIT CARD PROCESSING SERVICE**

#### **SECTION.**

4-115-101. Credit card processing service  
— Required disclosures —  
Prohibitions.

#### **SECTION.**

4-115-102. Penalties and enforcement.  
4-115-103. Applicability and exclusions.

#### **4-115-101. Credit card processing service — Required disclosures — Prohibitions.**

(a)(1) Any person or entity that offers a credit card processing service in this state shall disclose the following information on any contract or agreement to render a credit card processing service:

(A) The effective date of the contract;

(B) The term of the contract;

(C) The amount of any monthly minimum fee or charge for the credit card processing service; and

(D) The amount of any fee or charge for terminating the contract or agreement.

(2) The disclosures required in subsection (a) of this section and any other terms and conditions pertaining to the use of the credit card processing service shall be printed in 8-point font at a minimum.

(b) A person or entity that offers a credit card processing service in this state shall not charge:

(1) A fee of more than fifty dollars (\$50.00) for terminating a contract for credit card processing service; or

(2) A monthly minimum fee under a credit card processing service contract for more than one (1) month after the credit card processing service contract is terminated.

(c) Equipment rentals or lease purchase payments charged by a person or entity that offers a credit card processing service shall not be considered to be fees for the purposes of this chapter.

**History.** Acts 2007, No. 911, § 1.

#### **4-115-102. Penalties and enforcement.**

(a) A violation of the provisions of this chapter by a person or entity providing credit card processing service shall constitute an unfair and deceptive act or practice, as defined by § 4-88-101 et seq.

(b) All remedies, penalties, and authority granted to the Attorney General under § 4-88-101 et seq. shall be available to the Attorney General for the enforcement of this chapter.

**History.** Acts 2007, No. 911, § 1; 2009, No. 624, § 1. deleted (b) through (d) and redesignated (a)(1) and (2) as (a) and (b).

**Amendments.** The 2009 amendment

#### **4-115-103. Applicability and exclusions.**

(a) Nothing contained in this chapter shall:

(1) Affect the jurisdiction of state or federal bank regulators over the regulation of credit card processing services provided by state or national banks; or

(2) Limit the rights or remedies that are otherwise available to a person or an entity that has contracted with a credit card processing service.

(b) This chapter does not apply to:

(1) A contract entered into before August 1, 2007;

(2) A state bank, a national bank, or a savings association, each as defined in 12 U.S.C. § 1813, as it existed on January 1, 2009; or

(3) The parent, affiliate, or subsidiary of a state bank, a national bank, or a savings association, each as defined in 12 U.S.C. § 1813, as it existed on January 1, 2009.

(c) The obligations under this chapter are cumulative and do not limit the obligations imposed under any other state or federal law.

**History.** Acts 2007, No. 911, § 1; 2009, No. 624, § 2.

**Amendments.** The 2009 amendment rewrote (a), which read: "Nothing con-

tained in this chapter shall affect the jurisdiction of state or federal bank regulators over regulations of credit card processing services provided by state or na-

tional banks"; and rewrote (b), which read: "The provisions of this chapter shall only apply to new contracts entered into after July 31, 2007."

## CHAPTER 116

### REFUND ANTICIPATION LOAN ACT

#### SECTION.

4-116-101. Title and intent.

4-116-102. Definitions.

4-116-103. Scope.

4-116-104. Posting of fee schedules and disclosures.

#### SECTION.

4-116-105. Application disclosures.

4-116-106. Oral disclosures.

4-116-107. Prohibited activities.

4-116-108. Remedies.

#### 4-116-101. Title and intent.

(a) This act shall be known and referred to as the "Refund Anticipation Loan Act".

(b) It is the intent of the General Assembly that this act shall protect consumers who enter into a refund anticipation loan and a refund anticipation check transaction.

**History.** Acts 2009, No. 1402, § 1.

#### 4-116-102. Definitions.

(1) "Consumer" means a person who, individually or in conjunction with another consumer, is solicited for, applies for, or receives a refund anticipation loan or refund anticipation check;

(2) "Creditor" means a person who makes a refund anticipation loan or who takes an assignment of a refund anticipation loan;

(3)(A) "Facilitator" means a person who, individually or in conjunction or cooperation with another person:

(i) Processes, receives, or accepts an application or agreement for a refund anticipation loan or refund anticipation check;

(ii) Services or collects upon a refund anticipation loan or refund anticipation check; or

(iii) Facilitates the making of a refund anticipation loan or refund anticipation check.

(B) "Facilitator" does not include a bank, savings and loan association, credit union, or person who acts solely as an intermediary and does not deal with the public in the making of a refund anticipation loan or refund anticipation check;

(4) "Refund anticipation check" means a check, stored value card, or other payment mechanism, representing the proceeds of the consumer's tax refund, which was issued by a depository institution or other person that received a direct deposit of the consumer's tax refund or tax credit and for which the consumer has paid a fee or other consideration for such payment mechanism.

(5)(A) "Refund anticipation loan" means a loan arranged to be paid directly or indirectly from the proceeds of the consumer's income tax refund or tax credits.

(B) "Refund anticipation loan" includes any sale, assignment, or purchase of a consumer's tax refund at a discount or for a fee, whether or not the consumer is required to repay the buyer or assignee if the Internal Revenue Service denies or reduces the consumer's tax refund;

(6)(A) "Refund anticipation loan fee" means any charges, fees, or other consideration charged or imposed directly or indirectly for the making of or in connection with a refund anticipation loan.

(B) "Refund anticipation loan fee" includes a charge, fee, or other consideration for a deposit account if the deposit account is used for receipt of the consumer's tax refund to repay the amount owed on the loan; and

**History.** Acts 2009, No. 1402, § 1.

#### **4-116-103. Scope.**

Unless a facilitator has complied with the provisions of this chapter, a facilitator, including any officer, agent, employee or representative, individually or in conjunction or cooperation with another person, shall not:

(1) Solicit the execution of, process, receive, or accept an application or agreement for a refund anticipation loan or refund anticipation check; or

(2) Facilitate the making of a refund anticipation loan or refund anticipation check.

**History.** Acts 2009, No. 1402, § 1.

#### **4-116-104. Posting of fee schedules and disclosures.**

(a) A facilitator shall display a schedule showing the current fees for refund anticipation loans or refund anticipation checks facilitated at the office.

(b) A facilitator also shall prominently display on each fee schedule the following information:

(1) Examples of the interest rates charged for refund anticipation loans in the amounts of:

(A) Two hundred fifty dollars (\$250);

(B) Five hundred dollars (\$500);

(C) One thousand dollars (\$1,000); and

(D) Two thousand five hundred dollars (\$2,500);

(2) A legend, centered, in bold capital letters, and in one-inch letters stating: "NOTICE CONCERNING REFUND ANTICIPATION LOANS"; and

(3) The following statement: "When you take out a refund anticipation loan, you are borrowing money against your tax refund. If your tax refund is less than expected, you will still owe the entire amount of the

loan. If your refund is delayed, you may have to pay additional costs. YOU CAN USUALLY GET YOUR REFUND IN 8 TO 15 DAYS WITHOUT PAYING ANY EXTRA FEES AND TAKING OUT A LOAN. You can have your tax return filed electronically and your refund direct deposited into your own bank account without obtaining a loan or paying fees for an extra product.”

(c)(1) The postings required by this section shall be made in no less than 28-point type on a document measuring no less than sixteen inches by twenty inches (16" x 20").

(2) The posting required in this section shall be displayed in a prominent location at each office where the facilitator is facilitating refund anticipation loans.

(d) A facilitator shall not facilitate a refund anticipation loan or refund anticipation check unless;

(1) The disclosures required by this section are displayed; and

(2) The fee charged for the refund anticipation loan or refund anticipation check is the same as the fee displayed on the schedule.

**History.** Acts 2009, No. 1402, § 1.

#### **4-116-105. Application disclosures.**

(a) When a consumer applies for a refund anticipation loan, the facilitator shall disclose to the consumer on a colored-paper form separate from the application in 14-point type face, the following information:

(1) The fee for the refund anticipation loan, including the fee for the tax preparation and other fees charged the consumer;

(2) The time within which the proceeds of the refund anticipation loan will be paid to the consumer if the loan is approved;

(3) For refund anticipation loans, the following disclosures:

(A) A legend, centered, in bold, capital letters, and in 18-point type stating: “NOTICE”; and

(B) The statement: “This is a loan. You are borrowing money against your tax refund. If your tax refund is less than expected, you will still owe the entire amount of the loan. If your refund is delayed, you may have to pay additional costs. YOU CAN USUALLY GET YOUR REFUND IN 8 TO 15 DAYS WITHOUT GETTING A LOAN OR PAYING EXTRA FEES. You can have your tax return filed electronically and your refund direct deposited into your bank account without obtaining a loan or other paid product.”; and

(4)(A) For refund anticipation loans, disclosure of the refund anticipation loan interest rate.

(B) The refund anticipation loan interest rate shall be calculated utilizing the guidelines established under the federal Truth in Lending Act, 15 U.S.C. § 1601 et seq., as it existed on January 1, 2009.

(b) If a consumer applies for a refund anticipation check, the facilitator shall disclose to the consumer on a colored-paper form separate from the application in 14-point type face, the following information:

(1) The fee for the refund anticipation check, including the fee for tax preparation and other fees charged the consumer;

(2) The time within which the proceeds of the refund anticipation check will be paid to the consumer; and

(3) The following disclosures:

(A) A legend, centered, in bold, capital letters, and in 18-point type stating: "NOTICE"; and

(B) The statement: "You are paying [amount of refund anticipation check fee] to get your refund check through [name of issuer of the refund anticipation check]. YOU CAN AVOID THIS FEE AND STILL RECEIVE YOUR REFUND IN THE SAME AMOUNT OF TIME BY HAVING YOUR REFUND DIRECTLY DEPOSITED INTO YOUR BANKACCOUNT. You can also wait for the Internal Revenue Service to mail you a check."

(c) The facilitator shall provide to the consumer before completing the loan or check transaction in a form that can be kept by the consumer the following:

(1) The disclosures required by this subsection;

(2) A copy of the completed loan or check application and agreement; and

(3) For refund anticipation loans, the disclosures required by the federal Truth in Lending Act.

(d) The disclosures required by this section shall be provided in English and in the language used primarily for oral communication between the facilitator and the consumer.

**History.** Acts 2009, No. 1402, § 1.

#### **4-116-106. Oral disclosures.**

(a) If a consumer applies for a refund anticipation loan, the facilitator shall orally inform the consumer:

(1) That the product is a loan that lasts one (1) or two (2) weeks;

(2) That if the consumer's tax refund is less than expected, the consumer is liable for the full amount of the loan and must repay any difference;

(3) The amount of the refund loan fee; and

(4) The refund anticipation loan interest rate.

(b) If a consumer applies for a refund anticipation check, the facilitator shall orally inform the consumer:

(1) The amount of the refund check; and

(2) That the consumer may receive a refund in the same amount of time without a fee if the tax return is filed electronically and if the consumer directly deposits the refund in the consumer's own bank account.

(c) The disclosures required in this section shall be provided in the language primarily used for oral communication between the facilitator and the consumer.

**History.** Acts 2009, No. 1402, § 1.

#### **4-116-107. Prohibited activities.**

A facilitator shall not:

(1) Require a consumer to enter into a loan agreement in order to complete a tax return;

(2)(A) Charge or impose any fee or charge or require other consideration in the making or facilitating of a refund anticipation loan or refund anticipation check apart from the fee charged by the creditor or bank that provides the loan or check.

(B)(i) This section does not prohibit the charge or fee imposed by the facilitator to all of its customers if the same fee in the same amount is charged to customers who do not receive refund anticipation loans, refund anticipation checks, or other tax-related financial products.

(ii) This fee may include fees for tax return preparation;

(3) Engage in a transaction, practice, or course of business that operates a fraud upon a consumer in connection with a refund anticipation loan or refund anticipation check, including making oral statements contradicting any of the information required to be disclosed under this chapter;

(4) Directly or indirectly arrange for any third party to charge an interest, fee, or charge related to a refund anticipation loan or refund anticipation check, other than the refund anticipation loan or refund anticipation check fee imposed by the creditor, including without limitation charges for insurance, attorney's fees, other collection costs, or check cashing.

(5) Misrepresent a material fact or condition of a refund anticipation loan or refund anticipation check; and

(6) Fail to process the application for a refund anticipation loan promptly after the client applies for the loan.

**History.** Acts 2009, No. 1402, § 1.

#### **4-116-108. Remedies.**

(a) A facilitator who violates a provision of this chapter is in violation of the Deceptive Trade Practices Act, § 4-88-101 et seq., and a consumer shall have all rights and remedies provided under this law.

(b) A facilitator who willfully fails to comply with any provision of this chapter is liable to the consumer for:

(1) Actual and consequential damages;

(2) Statutory damages of one thousand dollars (\$1,000); and

(3) Reasonable attorney's fees and costs.

**History.** Acts 2009, No. 1402, § 1.

## **CHAPTER 117**

### **DISTRIBUTION OF DRUG SAMPLES**

**SECTION.**

4-117-101. Definitions.

4-117-102. Distribution of drug samples.

#### **4-117-101. Definitions.**

As used in this chapter:

(1) “Authorized distributors of record” means those distributors with whom a drug manufacturer has established an ongoing relationship to distribute the drug manufacturer’s products;

(2) “Board” means the Arkansas State Board of Pharmacy;

(3)(A) “Distribute” means the distribution of drug samples.

(B) “Distribute” does not include the providing of a drug sample to a patient by a:

(i) Physician or practitioner licensed to prescribe the drug;

(ii) Health care professional acting at the direction and under the supervision of a physician or practitioner; or

(iii) Pharmacy that has been granted approval from the Arkansas State Board of Pharmacy to handle samples at the direction of a physician or practitioner and that received the sample under this chapter;

(4) “Drug” means all medicines and preparations recognized in the United States Pharmacopoeia or the National Formulary as substances intended to be used for the care, mitigation, or prevention of disease of either humans or other animals;

(5) “Drug sample” means a unit of a prescription drug that is not intended to be sold and is intended to promote the sale of the drug;

(6) “Licensed pharmacist” means a person holding a license under § 17-92-101 et seq.;

(7) “Pharmacy” means the place licensed by the board in which drugs, chemicals, medicines, prescriptions, and poisons are compounded, dispensed, or sold at retail; and

(8) “Physician” means a practitioner of medicine licensed under the laws of this state or some other state.

**History.** Acts 2011, No. 719, § 3.

#### **4-117-102. Distribution of drug samples.**

(a) Except under subsections (b) and (c) of this section, a person shall not distribute a drug sample.

(b)(1) A drug manufacturer or authorized distributor of record of a drug may distribute a drug sample by mail, common carrier, or by direct distribution by an authorized company representative to physicians or practitioners licensed to prescribe the drugs.

(2)(A) A distribution of a drug sample under subdivision (b)(1) of this section shall be made only upon the written request of the licensed physician or practitioner.

(B) The written request shall contain:

(i) The name, address, professional designation, and signature of the physician or practitioner making the request;

(ii) The identity of the drug sample requested, the strength of the drug, and the quantity requested;

(iii) The name of the drug manufacturer of the drug sample requested; and

(iv) The date of the request.

(c)(1)(A) A drug manufacturer or authorized distributor of record may distribute drug samples to its authorized company representatives by common carrier.

(B) A drug sample that is distributed by common carrier shall be shipped in a manner that requires the signature of the recipient before delivery.

(C) The authorized company representative shall personally sign for this delivery.

(2) The drug manufacturer or authorized distributor of record does not violate this subsection if the common carrier fails to obtain the authorized company representative's signature.

(d)(1) The authorized company representative shall store the drug samples under conditions that will maintain the stability, integrity, and effectiveness of the drug samples and ensure that the drug samples will be free of contamination, deterioration, and adulteration as required under the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 et seq.

(2) All compendial and labeling requirements for storage and handling of a particular prescription drug shall be followed.

(e)(1) The name and address of the individual responsible for responding to requests by the United States Food and Drug Administration regarding samples on behalf of a drug manufacturer or distributor shall be provided by the manufacturer to the Arkansas State Board of Pharmacy.

(2) The individual identified under subdivision (e)(1) of this section shall further serve as the initial contact person to the board concerning any alleged violations of this section.

(f)(1) A drug manufacturer or an authorized distributor of record shall maintain a list of:

(A) The name and address of each representative of the manufacturer or authorized distributor who distributes drug samples; and

(B) Each site where drug samples are stored.

(2) A record and a list maintained under this subsection shall be made available by the drug manufacturer or authorized distributor to the board upon request.

(g) A drug manufacturer or an authorized distributor shall notify the board of a significant loss of drug samples and known theft of drug samples.

(h) The board may report to the United States Food and Drug Administration any violation of this section.

(i) This section applies only to the distribution of drug samples within the State of Arkansas.

(j) A drug manufacturer that distributes drug samples in the State of Arkansas shall have a policy for drug screening of an employee who distributes drug samples in this state.

**History.** Acts 2011, No. 719, § 3.

# Index to Title 4 (41-117)

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## A

### **ACCESS CODES.**

**Personal information protection act,**  
§§4-110-101 to 4-110-108.

### **ACTIONS.**

#### **Consumer protection.**

Private cause of action by persons  
suffering damage or injury,  
§4-88-113.

#### **Credit report security freezes.**

Action for noncompliance, §4-112-112.

#### **Electronic mail.**

Unsolicited commercial and sexually  
explicit electronic mail,  
§§4-88-606, 4-88-607.

#### **Franchises.**

Misleading and fraudulent schemes.

Statute of limitations, §4-72-207.

Petroleum products franchises.

Dealer-supplier or distributor  
franchises.

Cancellation, termination or  
refusal to renew, §4-72-503.

Supplier-distributor franchises.

Cancellation, termination or  
refusal to renew, §4-72-403.

#### **Health-related discount cards not insurance, §4-106-202.**

#### **Home solicitation sales.**

Civil actions against violators,  
§4-89-106.

#### **Interest.**

Usurious contract.

Attorneys at law.

Fees in litigation involving  
usurious transactions,  
§4-57-108.

#### **Lemon law.**

Consumer's right to bring civil action  
to enforce provisions, §4-90-415.

#### **Limited liability partnerships.**

Foreign limited liability partnerships.

Action by attorney general,  
§4-46-1105.

#### **Limited partnerships.**

Derivative actions, §§4-47-1002 to  
4-47-1005.

Direct action by partner, §4-47-1001.

Dissolution, claims not known at time  
of.

Limitation of actions, §4-47-807.

## **ACTIONS —Cont'd**

### **Limited partnerships —Cont'd**

Foreign limited partnerships.

Action to restrain transacting of  
business, §4-47-908.

General partners.

Effect of actions by and against  
partnership and partners,  
§4-47-405.

Liability for consent to improper  
distributions, §4-47-509.

Improper distributions.

Limitation of actions, §4-47-509.

Order for signature or unsigned filing  
of document, §4-47-205.

### **Monopolies and restraint of trade.**

Automobile dealer's anti-coercion act.

Double damages actions of injured  
parties, §4-75-412.

By attorney general, §4-75-315.

Statute of limitations, §4-75-320.

Venue, §4-75-319.

Discrimination.

Price of manufactured products, coal  
oil or dressed beef.

Recovery of forfeitures, §4-75-501.

Interstate or foreign commerce.

Actions not barred because it affects,  
§4-75-318.

Precedence of actions brought under  
subchapter, §4-75-308.

Unfair practices.

By attorney general, §4-75-212.

Statute of limitations, §4-75-217.

Venue, §4-75-216.

Interstate or foreign commerce.

Action not barred because it  
affects, §4-75-215.

### **Odometer regulations.**

Civil action by private person,  
§4-90-207.

### **Partnerships.**

By or against partnerships and  
partners, §4-46-307.

By partner against partnership,  
§4-46-405.

By partnership against partner,  
§4-46-405.

Liability for partner's actionable  
conduct, §4-46-305.

Liability for partnership obligations,  
§4-46-306.

**ACTIONS —Cont'd****Partnerships —Cont'd**

Liability of purported partner,  
§4-46-308.

Wrongful dissociation, liability,  
§4-46-602.

**Restaurant franchises.**

Commencement of civil actions,  
§4-72-602.

**Service contracts.**

Enforcement of provisions, §4-114-111.

**Social security numbers.**

Misappropriation, prohibited acts,  
§4-86-107.

**Spam.**

Unsolicited commercial and sexually  
explicit electronic mail,  
§§4-88-606, 4-88-607.

**Unsolicited commercial and sexually  
explicit electronic mail,**

§§4-88-606, 4-88-607.

**ADVERTISING.****Cigarettes and tobacco products.**

Unfair cigarette sales.

Sales at less than cost.  
Evidentiary effect of  
advertisement for, §4-75-708.

**Consumer protection.**

"Bait and switch" advertising.

Prohibited, §4-88-107.

Unlawful practices, §4-88-107.

**Discount cards.**

Health-related discount cards not  
insurance.

Prohibited acts, §4-106-201.

**Franchises.**

Unlawful practices of franchisors,  
§4-72-206.

**Going out of business sales.**

Licenses.

Required, §4-74-105.

**Health-related discount cards not  
insurance.**

Prohibited acts, §4-106-201.

**Mail and telephone solicitation  
sales, §§4-95-101 to 4-95-108.****Notario or notario publico.**

Advertising services using terms.  
Restrictions, §§4-109-101 to  
4-109-105.

**Pay per call, §4-98-104.****Prizes.**

Bank night or buck night.

Certain kinds of advertising made  
lawful, §4-70-102.

Promotions, regulation, §§4-102-101 to  
4-102-109.

**ADVERTISING —Cont'd****School calendars.**

Disclosures by solicitors for  
advertisements on, §§4-88-501 to  
4-88-503.

Definitions, §4-88-501.

Penalties, §4-88-503.

Violations, §4-88-502.

**Telephones.**

Pay per call, §4-98-104.

**AFTERMARKET CRASH PARTS,**

§§4-90-301 to 4-90-307.

**Definitions, §4-90-302.****Installer.**

Defined, §4-90-302.

**Insurance requirements, §4-90-307.****Insurer.**

Defined, §4-90-302.

**Legislative intent, §4-90-301.****Nonoriginal equipment**

manufacturer aftermarket crash  
part.

Defined, §4-90-302.

**Penalties, §4-90-303.****Repair estimates, §4-90-305.****Repair facility.**

Defined, §4-90-302.

**Required identification, §4-90-304.****Warranties.**

Repairs on warranted vehicles,  
§4-90-306.

**AGENTS.****Health-related discount cards not  
insurance.**

Sellers to designate and register agent  
for service of process, §4-106-203.

**Limited partnerships.**

Change of office and agent for service,  
§4-47-115.

Designation of office and agent for  
service, §4-47-114.

General partner as agent of  
partnership, §4-47-402.

**Partnerships.**

Partner deemed agent of partnership,  
§4-46-301.

**Sales representatives.**

General provisions, §§4-70-301 to  
4-70-306.

**AGRICULTURE.****Farm equipment retailer franchise  
protection, §§4-72-301 to 4-72-311.****Farm machinery.**

Hour meters on farm machinery,  
§§4-96-201, 4-96-202.

Alteration prohibited, §4-96-202.

**AGRICULTURE —Cont'd****Farm machinery —Cont'd**

Hour meters on farm machinery

—Cont'd

Conspiracy to violate subchapter,  
§4-96-202.

Misdemeanors.

Violations of subchapter,  
§4-96-202.

Tampering prohibited, §4-96-201.

**Franchises.**Farm equipment retailer franchise  
protection, §§4-72-301 to 4-72-311.**Monopolies and restraint of trade.**

Discrimination.

Buying milk, cream, butter, butter  
fat, poultry, eggs, grain or cotton  
seed, §4-75-502.**Plant board.**Quality specifications for engine fuels,  
petroleum products and  
automotive lubricants.Administration by director,  
§4-108-204.Adoption of standards and rules,  
§§4-108-204, 4-108-212.State petroleum products division,  
§4-108-205.**Security interest in farm products.**Failure to disclose person with,  
§4-56-102.**AMUSEMENTS.****Tickets to live events, restrictions  
on Internet sales, §4-70-103.****ANIMALS.****Pet warranties, §4-97-105.****Retail pet stores, §§4-97-101 to  
4-97-109.****ANTI-TRUST ACT.****Monopolies and restraint of trade.**General provisions, §§4-75-301 to  
4-75-320.**APPEALS.****Consumer protection.**Court orders for production of  
witnesses and evidence, §4-88-112.**Limited partnerships.**Reinstatement following  
administrative dissolution.  
Appeal of denial, §4-47-811.**APPLIANCES.****Service contracts, §§4-114-101 to  
4-114-112.****ARBITRATION.****Lemon law.**

Informal dispute resolution, §4-90-414.

**ARBITRATION —Cont'd****Motor vehicle sales contracts.**Arbitration clauses in sales contracts,  
§4-75-413.**Restaurant franchises.**

Procedural fairness.

Commencement of arbitration  
proceeding, §4-72-602.**ART.****Consignment act.**

Applicability of subchapter, §4-73-203.

Art dealers.

Defined, §4-73-202.

Liability, §4-73-207.

Violations.

Penalty, §4-73-204.

Artists.

Defined, §4-73-202.

Attorney's fees.

Action by artists against dealers,  
§4-73-204.

Citation of act.

Short title, §4-73-201.

Costs.

Actions by artists against dealers,  
§4-73-204.

Dealers.

Art dealers.

Defined, §4-73-202.

Definitions, §4-73-202.

Delivery of work of fine art for  
exhibition or sale.

Effect, §4-73-207.

Liens.

Exemptions.

Works of art consigned for sale  
exempt from liens, §4-73-206.

On consignment.

Defined, §4-73-202.

Penalties.

Violations of act by dealers,  
§4-73-204.

Security interests.

Exemptions.

Works of art consigned for sale  
exempt from security interest  
of creditors of art dealer,  
§4-73-206.

Title of act.

Short title, §4-73-201.

Waiver of subchapter provisions void,  
§4-73-205.**Construction and interpretation.**

Consignment act.

Applicability of subchapter,  
§4-73-203.**Definitions.**

Consignment act, §4-73-202.

**ART —Cont'd****Liens.**

Consignment act.

Exemption from liens.

Works of art consigned for sale,  
§4-73-206.

**Penalties and forfeitures.**

Consignment act.

Violation of act by dealer, §4-73-204.

**Sales.**

Prints.

Sales of fine prints, §§4-73-301 to  
4-73-305.

**Waiver.**

Consignment act.

Voidness of waiver of provisions of  
subchapter, §4-73-205.

**ASSIGNMENTS.****Contracts.**

Nonnegotiable instruments generally,  
§§4-58-101 to 4-58-110.

**Defenses.**

Nonnegotiable instruments.

Retention of defenses, §§4-58-101,  
4-58-105.

**Forgery.**

Nonnegotiable instruments.

Proof of assignment not required  
except on allegation of forgery,  
§4-58-109.

**Franchises.**

Definition of assignments, §4-72-202.

Notice, §4-72-205.

**Liens.**

Nonnegotiable instruments.

Vendor's lien inures to benefit of  
assignee, §4-58-107.

**Nonnegotiable instruments.**

Assignable, §4-58-102.

Consideration.

Release of consideration.

Assignor may not release after  
assignment, §4-58-106.

Unnecessary to set out, §4-58-103.

Date of assignment.

Assignments to bear true date,  
§4-58-104.

Blank assignment, §4-58-104.

Defenses.

Retention, §§4-58-101, 4-58-105.

Forgery.

Proof of assignment required on  
allegation of forgery, §4-58-109.

Good faith assignments complete at  
time of assignment, §4-58-105.

Liens.

Vendor's lien inures to benefit of  
assignee, §4-58-107.

**ASSIGNMENTS —Cont'd****Nonnegotiable instruments —Cont'd**

Nonpayment or protest of instrument.

Liability of assignors, §4-58-108.

Actions, §4-58-108.

Recovery by plaintiff, §4-58-110.

Power of assignor after assignment.

Limited, §4-58-106.

Proof of assignment.

Not required except on allegation of  
forgery, §4-58-109.

Subsequent assignees acquire no  
rights, §4-58-105.

When good faith assignment complete,  
§4-58-105.

**Trademarks,** §4-71-207.

**ASSISTIVE DEVICE WARRANTIES,**

§§4-105-201 to 4-105-206.

**Acceptance of return of device.**

Failure to fix nonconformity in  
reasonable amount of time,  
§4-105-204.

**Allowance for use,** §§4-105-204,  
4-105-205.

**Assistive device defined,** §4-105-201.

**Current value of written lease,**  
§4-105-205.

**Definitions,** §4-105-201.

**Device not conforming to applicable  
express warranty.**

Repair of nonconformity, §4-105-203.

**Express warranties,** §4-105-202.

**Manufacturer team to have  
expressly warranted,** §4-105-202.

**Offer to manufacturer to transfer  
possession of device.**

Required to receive comparable new  
device or refund, §4-105-206.

**Reasonable allowance for use,**  
§§4-105-204, 4-105-205.

**Reasonable amount of time to fix  
nonconformity,** §4-105-204.

**Refund to consumer.**

Failure fix nonconformity and  
reasonable amount of time,  
§§4-105-204, 4-105-206.

**Repair of nonconformity,** §4-105-203.

Reasonable amount of time defects,  
§4-105-204.

**Replacement of device.**

Failure to fix nonconformity in  
reasonable amount of time,  
§§4-105-204, 4-105-206.

**Return of device.**

Failure to fix nonconformity in  
reasonable amount of time,  
§4-105-204.

**ASSISTIVE DEVICE WARRANTIES**

—Cont'd

**Valuation**, §4-105-205.**ASSUMED NAMES.****Business under assumed name.**

Applicability of provisions, §4-70-201.

Certificate of withdrawal from or  
disposition of interest in business.  
Filing, §4-70-204.

Certificate setting forth name.

Contents, §4-70-203.

Evidentiary effect of certified copy,  
§4-70-205.

Fees for clerk, §4-70-206.

Filing.

Required, §4-70-203.

Change in ownership of business.

Certificate to be filed, §4-70-204.

Corporations.

Exemption, §4-70-201.

County clerks.

Fees, §4-70-206.

Filing and indexing of certificates,  
§§4-70-203 to 4-70-205.

Partnerships.

Conducting business under fictitious  
name, §4-42-707.

Penalties.

Violations of provisions, §4-70-202.

Violations of provisions.

Penalties, §4-70-202.

**Corporations.**

Business under assumed name.

Exception to provisions, §4-70-201.

**Evidence.**

Business under assumed name.

Certificate setting forth name.

Certified copy of certificate as  
presumptive evidence,  
§4-70-205.**Fees.**

Business under assumed name.

Certificate setting forth name.

Fee of clerk for indexing and  
filing, §4-70-206.**Partnerships.**

Business under assumed name.

Exceptions as to certain limited  
partnerships, §4-70-201.**Penalties.**

Business under assumed name.

Violations of provisions, §4-70-201.

**Presumptions.**

Business under assumed name.

Certificate setting forth name.

Evidentiary effect, §4-70-205.

**ATHLETIC CLUBS.****Health spas.**Consumer protection, §§4-94-101 to  
4-94-109.**ATHLETIC CONTESTS.****Credit card solicitation at college  
campus.**Solicitations permitted at athletic  
events.Institution to include credit seminar  
within freshman orientation,  
§4-104-203.**ATTORNEY GENERAL.****Credit report security freezes.**Remedies available to attorney  
general, §4-112-113.**Foreign limited liability  
partnerships.**Action by attorney general,  
§4-46-1105.**Home solicitation sales.**

Enforcement of provisions, §4-89-106.

**Limited liability partnerships.**

Foreign limited liability partnerships.

Action by attorney general,  
§4-46-1105.**Monopolies and restraint of trade.**

Actions and settlements by, §4-75-315.

Statute of limitations, §4-75-320.

Venue, §4-75-319.

Antitrust enforcement account.

Established in office, §4-75-317.

Unfair practices.

Actions by, §4-75-212.

Statute of limitations, §4-75-217.

Venue, §4-75-216.

Antitrust enforcement account.

Established in office of attorney  
general, §4-75-214.**No call lists.**Consumer telephone privacy act,  
§§4-99-401 to 4-99-408.**Personal information protection act.**Action by, violation punishable by,  
§4-110-108.**Telephonic sellers.**

Agent for service, §4-99-109.

Enforcement of chapter, §4-99-111.

**ATTORNEYS AT LAW.****Franchises.**

Fees.

Misleading and fraudulent schemes.

Violation of provisions.

Franchisee's remedies,  
§4-72-208.

**ATTORNEYS AT LAW —Cont'd****Interest.****Fees.**

Award of fees in litigation involving  
usurious transaction, §4-57-108.

**Notario or notario publico.**

Notary advertising services as.

Inapplicability of provisions to  
attorneys, §4-109-104.

Not licensed to practice law,  
disclosure required, §4-109-103.

**Notes.****Fees.**

Allowable provisions in promissory  
notes for fees, §4-56-101.

**Promissory notes.****Fees.**

Allowable provisions in promissory  
notes for attorney's fees,  
§4-56-101.

**Trade secrets.**

Award of attorney's fees, §4-75-607.

**ATTORNEYS' FEES.****Cigarettes and tobacco products.**

Unfair cigarette sales.

Recovery of attorney's fees in actions  
for violations, §4-75-713.

**Consumer credit.**

Equal consumer credit act.

Actions for damages, §4-87-105.

**Contracts.**

Provisions in promissory notes for  
fees, §4-56-101.

**Copyright collection practices,  
§4-76-107.****Credit report security freezes.**

Action for noncompliance, §4-112-112.

**Franchises.**

Misleading and fraudulent schemes.

Franchisee's remedies, §4-72-208.

**Lemon law.**

Enforcement of provisions, §4-90-415.

**Limited partnerships.**

Derivative actions, §4-47-1005.

**Notes.**

Allowable provisions in notes  
providing in part for attorney's  
fees, §4-56-101.

**Odometer tampering, action for,  
§4-90-207.****Pay per call.**

Consumer remedies, §4-98-105.

**Prize promotion, §4-102-103.****Promissory notes.**

Allowable provisions, §4-56-101.

**ATTORNEYS' FEES —Cont'd****Sales representatives.**

Noncompliance with provisions  
relating to payment of  
commission, §4-70-306.

**Trade secrets.**

Award to prevailing party in actions,  
§4-75-607.

**AUTOMOBILE DEALERS'  
ANTI-COERCION ACT.**

**Monopolies and restraint of trade,**  
§§4-75-401 to 4-75-412.

**B****BAIT AND SWITCH.**

**Prohibited advertising,** §4-88-107.

**BANK DEPARTMENT.****Gift cards.**

Fair gift card act, rules promulgation,  
§4-88-706.

**BANKRUPTCY AND INSOLVENCY.****Statute of frauds.**

Promises to pay debt discharged in  
bankruptcy.  
Writing required, §4-59-101.

**BILLS OF LADING.****Duplicate bills.**

Issue of duplicate bills not so marked.  
Penalty, §4-59-303.

**False statements.**

Issue of bill containing.  
Penalty, §4-59-302.

**Fraud, intent to defraud.**

Inducing carrier to issue bill when  
goods have not been received,  
§4-59-305.

Issue of bill containing false  
statement, §4-59-302.

Issue of bill for goods not received,  
§4-59-301.

Issue of duplicate bills not so marked,  
§4-59-303.

Issue of nonnegotiable bill not so  
marked, §4-59-304.

**Liens.**

Negotiation of bill for goods upon  
which there is lien or mortgage,  
§4-59-306.

**Negotiation of bill for mortgaged  
goods, §4-59-306.**

**Negotiation of bill when goods not  
in carrier's possession, §4-59-307.**

**BILLS OF LADING —Cont'd****Nonnegotiable bills.**

Issue of nonnegotiable bill not so marked, §4-59-304.

**BONDS, SURETY.****Going out of business sales.**

Licenses.

Application for license.

Application to be accompanied by bond, §4-74-107.

**Service contracts.**

Surety bond of provider, §4-114-104.

**Telephonic sellers, §4-99-107.****BROADBAND SERVICES.****Connect Arkansas broadband**

**program, §§4-113-101 to 4-113-106.**

Council, §4-113-104.

Critical infrastructure, §4-113-106.

Definitions, §4-113-102.

Goals of program, §4-113-103.

Grants, §4-113-103.

Nonprofit corporation, creation, §4-113-103.

Priority for certain economic development plans, §4-113-106.

Registration of service providers, §4-113-105.

Title of act, §4-113-101.

**BUILDINGS AND CONSTRUCTION.****Contracts.**

Hold harmless clauses unenforceable, §4-56-104.

**BURDEN OF PROOF.****Service contracts.**

Enforcement of provisions, §4-114-111.

**Unfair competition and deceptive trade practices.**

Exemption or exception from chapter applicability, §4-99-112.

**BUSINESS ASSOCIATIONS.****Limited liability partnerships,**

§§4-46-1001 to 4-46-1105.

**Limited partnerships, §§4-47-101 to 4-47-1302.****Partnerships, §§4-46-101 to 4-46-1207.****C****CALENDARS.****School calendars.**

Disclosures by solicitors for advertisements on, §§4-88-501 to 4-88-503.

Definitions, §4-88-501.

Penalties, §4-88-503.

**CALENDARS —Cont'd****School calendars —Cont'd**

Disclosures by solicitors for advertisements on —Cont'd  
Violations, §4-88-502.

**CALLER IDENTIFICATION****BLOCKING BY TELEPHONIC SELLERS.**

**Definitions, §4-99-301.**

**Penalties and remedies, §4-99-303.**

**Prohibition, §4-99-302.**

**Unfair or deceptive practice, §4-99-303.**

**CALLER IDENTIFICATION****SERVICE.****Deceptive trade practices.**

Defined, §4-88-102.

Fictitious or misleading names or telephone numbers.

Displaying resident's service, §4-88-107.

**Telephone sellers.**

Defined, §4-99-103.

Fictitious or misleading name or telephone number.

Displaying, §§4-99-103, 4-99-201.

**CARRIERS.****Freight.**

Freight and parcel delivery services.  
Interest on deposits for, §4-86-104.

**Interest.**

Freight and parcel delivery services.  
Interest on deposits, §4-86-104.

**CATS.****Lemon law, §4-97-105.****CEASE AND DESIST ORDERS.****Service contracts.**

Enforcement of provisions, §4-114-111.

**CHARITABLE ORGANIZATIONS.****Records.**

Solicitation of contributions.

Containers, §§4-103-201 to 4-103-205.

**CHARITABLE SOLICITATIONS.****Containers, §§4-103-201 to 4-103-205.**

Definitions, §4-103-201.

Disclosure label requirement, §4-103-202.

Enforcement of provisions, §4-103-204.

Exemptions from requirements, §4-103-203.

Supplemental nature of provisions, §4-103-205.

Violations as unfair and deceptive trade practices, §4-103-204.

**CHECKS.****Definitions.**

Insufficient funds, §4-60-101.

**Insufficient funds.**

Applicability of chapter, §4-60-102.

Definitions, §4-60-101.

Restitution.

Liability for, §4-60-103.

**Restitution, §§4-60-101 to 4-60-103.****Telemarketers submitting check for payment.**

Express consent of consumer required, §4-99-203.

**CHILDREN AND MINORS.****Debts.**

Statute of frauds.

Promise to pay debt contracted during infancy.

Writing required, §4-59-101.

**Statute of frauds.**

Promise to pay debt contracted during infancy.

Writing required, §4-59-101.

**CIGARETTES AND TOBACCO PRODUCTS.****Advertising.**

Unfair cigarette sales.

Sales at less than cost.

Evidentiary effect of advertisement for, §4-75-708.

**Contracts.**

Unfair cigarette sales.

Contracts in violation of act void, §4-75-705.

**Damages.**

Unfair cigarette sales.

Violations of provisions, §4-75-713.

**Definitions.**

Unfair cigarette sales, §4-75-702.

**Evidence.**

Costs.

Sales at less than cost.

Advertisements, §4-75-708.

Unfair cigarette sales.

Costs, §4-75-711.

**Injunctions.**

Unfair cigarette sales.

Violations of provisions, §4-75-713.

**Licenses.**

Sales, §4-75-707.

**Penalties.**

Unfair cigarette sales.

Sales at less than cost, §4-75-708.

**Sales.**

Licenses, §4-75-707.

Unfair cigarette sales, §§4-75-701 to 4-75-714.

**CIGARETTES AND TOBACCO PRODUCTS —Cont'd****Tobacco control board.**

Law enforcement powers, §4-75-714.

**Unfair cigarette sales.**

Advertising.

Evidentiary effect of advertisement to sell at less than cost, §4-75-708.

Attorneys' fees.

Recovery in actions for violations, §4-75-713.

Citation of act.

Short title, §4-75-701.

Combination sales, §4-75-709.

Competition.

Transactions to meet lawful competition authorized, §4-75-704.

Contracts.

Void contracts.

Contracts in violation of act, §4-75-705.

Costs.

Basic cost of cigarettes.

Defined, §4-75-702.

Sales outside ordinary channels of business not permissible to establish, §4-75-712.

Definitions.

Basic cost of cigarettes, §4-75-702.

Cost to retailer, §4-75-702.

Cost to wholesaler, §4-75-702.

Evidence, §4-75-711.

Cost survey, §4-75-711.

Sales at less than cost.

Advertisements.

Evidentiary effect, §4-75-708.

Combination sales, §4-75-709.

Prohibited, §4-75-708.

Sales by wholesaler to other wholesalers, §4-75-710.

Damages.

Violations of provisions, §4-75-713.

Definitions, §4-75-702.

Director of tobacco control.

Enforcement agents, §4-75-714.

Enforcement of provisions, §4-75-713.

Powers and duties, §4-75-706.

Enforcement agents, §4-75-714.

Evidence.

Cost, §4-75-711.

Cost survey, §4-75-711.

Exceptions, §4-75-703.

Injunctions.

Violations of provisions, §4-75-713.

## **CIGARETTES AND TOBACCO PRODUCTS —Cont'd**

### **Unfair cigarette sales —Cont'd**

#### **Licenses.**

Required, §4-75-707.

Revocation or suspension.

Power of director of tobacco control, §4-75-706.

#### **Misdemeanors.**

Sales at less than cost, §4-75-708.

#### **Penalties.**

Sales at less than cost, §4-75-708.

#### **Price fixing.**

Investigation by director of tobacco control, §4-75-706.

#### **Retailers.**

Defined, §4-75-702.

Licenses, §4-75-707.

#### **Title of act.**

Short title, §4-75-701.

#### **Violations of provisions.**

Contracts in violation void, §4-75-705.

Damages, §4-75-713.

Injunctions, §4-75-713.

#### **Wholesalers.**

Defined, §4-75-702.

Licenses, §4-75-707.

Sales by wholesaler to other wholesaler, §4-75-710.

### **Unfair cigarette sales act.**

Coupons supplied to customer.

Redemption by retailer, §4-75-709.

Intent to injure competitors and destroy competition.

Prima facie evidence, §4-75-708.

Promotional allowance provided to wholesaler or retailer.

Passing to purchaser, §4-75-709.

## **CLAIMS.**

### **Lemon law.**

Notice by consumer, §4-90-404.

## **CLASS ACTIONS.**

### **Consumer credit.**

Equal consumer credit act.

Prohibited, §4-87-103.

## **CLOSING OUT SALES.**

General provisions, §§4-74-101 to 4-74-111.

## **CLUBS.**

### **Health spas.**

Consumer protection, §§4-94-101 to 4-94-109.

## **COERCION.**

### **Automobile dealers' anti-coercion act.**

Monopolies and restraint of trade, §§4-75-401 to 4-75-412.

## **COLLECTION AGENCIES.**

### **Credit reporting disclosures.**

General provisions, §§4-93-101 to 4-93-104.

### **Reports.**

Credit reporting disclosures.

General provisions, §§4-93-101 to 4-93-104.

Telephone solicitations, §4-99-202.

## **COLLEGES AND UNIVERSITIES.**

### **Credit card solicitation on college campus, §§4-104-201 to 4-104-204.**

Athletic events, solicitations at.

Credit seminar within institutions  
freshman orientation,  
§4-104-203.

Definitions, §4-104-201.

Face-to-face solicitations, §4-104-202.

Fine for violation, §4-104-204.

Misdemeanor for violation, §4-104-204.

Personal solicitation of credit card application, §4-104-202.

## **COMMERCE.**

### **Monopolies and restraint of trade.**

Lawful commerce excepted from prohibition, §4-75-303.

## **COMPLAINTS.**

### **Limited partnerships.**

Derivative actions, §4-47-1004.

## **COMPUTERS AND SOFTWARE.**

### **Connect Arkansas broadband**

**program, §§4-113-101 to 4-113-106.**

**Personal information protection act, §§4-110-101 to 4-110-108.**

### **Spyware.**

Consumer protection against computer spyware act, §§4-111-101 to 4-111-105.

**COMPUTER SPYWARE, §§4-111-101 to 4-111-105.**

**Action by attorney general under deceptive trade practices act.**

Violation punishable by, §4-111-104.

**Blocking installation or disabling software.**

Preventing authorized user from, §4-111-103.

**COMPUTER SPYWARE —Cont'd****Consumer protection against computer spyware act.**

Short title, §4-111-101.

**Copying software on to computer.**

Unlawful acts, §4-111-103.

**Definitions, §4-111-102.****Hacking, §4-111-103.****Internet.**

Access to or use of.

Unlawful use of software to modify settings, §4-111-103.

**Personally identifiable information.**

Collecting through deceptive means, §4-111-103.

**Persons not authorized users.**

Unlawful acts, §4-111-103.

**Phishing, §4-111-103.**

Defined, §4-111-102.

**Security antispyware or antivirus software.**

Removing, disabling or rendering inoperative, §4-111-103.

**Spyware monitoring fund.**

Fines and penalties paid into, use of fund, §4-111-105.

**Unlawful acts, exceptions, §4-111-103.****COMPUTER VIRUS.****Consumer protection against computer spyware act,**

§§4-111-101 to 4-111-105.

**Defined, §4-111-102.****CONFIDENTIALITY OF INFORMATION.****Consumer protection.**

Deceptive trade practices.

Investigations, §4-88-111.

**Trade secrets.**

Actions under provisions.

Preservation of secrecy, §4-75-605.

**CONFLICT OF LAWS.****Foreign limited partnerships.**

Law governing generally, §4-47-901.

**Limited partnerships.**

Foreign limited partnerships.

Law governing generally, §4-47-901.

**Monopolies and restraint of trade.**

Unfair practices act.

Provisions controlling, §4-75-211.

**Motor vehicle sales contracts.**

Forum selection clauses, §4-75-413.

**Partnerships.**

Foreign limited partnerships.

Law governing generally, §4-47-901.

**Trade secrets.**

Effect of act on other laws, §4-75-602.

**CONNECT ARKANSAS****BROADBAND PROGRAM,**

§§4-113-101 to 4-113-106.

**CONSENT.****Limited partnerships.**

Proxies of partners for consent purposes, §4-47-118.

**Partnerships.**

Consent on plan of conversion, §4-46-903.

Consent to plan of merger, §4-46-907.

**CONSIGNMENTS.****Art consignment act,** §§4-73-201 to 4-73-207.**CONSPIRACY.****Farm machinery.**

Hour meters on farm machinery.

Violation of subchapter, §4-96-202.

**Hour meters on farm machinery.**

Violation of subchapter, §4-96-202.

**Monopolies and restraint of trade.**

Fixing prices or quantity of products.

Prohibited, §4-75-309.

Lawful commerce excepted, §4-75-303.

**CONSUMER CREDIT.****Class actions.**

Equal consumer credit act.

Prohibited, §4-87-103.

**Credit reporting disclosures.**

General provisions, §§4-93-101 to 4-93-104.

**Credit report security freezes,**

§§4-112-101 to 4-112-114.

**Damages.**

Equal consumer credit act.

Violations, §4-87-105.

**Definitions.**

Financial transaction cards, §4-59-501.

**Discrimination.**

Equal consumer credit act, §§4-87-101 to 4-87-105.

**Equal consumer credit act.**

Attorneys' fees.

Recovery in actions for violations, §4-87-105.

Citation of act.

Short title, §4-87-101.

Class actions.

Prohibited, §4-87-103.

Discrimination based on sex or marital status.

Damages, §4-87-105.

Unlawful, §4-87-104.

Jurisdiction.

Actions for violations, §4-87-102.

Title of act.

Short title, §4-87-101.

## **CONSUMER CREDIT —Cont'd** **Financial transaction cards.**

Definitions, §4-59-501.

Felonies.

Remission to acquirer of record of sale not made by remitter, §4-59-502.

Solicitation of merchant to remit record of sale not made by the merchant, §4-59-503.

## **Jurisdiction.**

Equal consumer credit act.

Actions for violations, §4-87-102.

## **Rental-purchase agreements,** §§4-92-101 to 4-92-107.

## **Reports.**

Credit reporting disclosures.

General provisions, §§4-93-101 to 4-93-104.

Credit report security freezes, §§4-112-101 to 4-112-114.

## **CONSUMER PROTECTION.**

### **Action by any person suffering damage or injury, §4-88-113.**

### **Advertising.**

"Bait and switch" advertising.

Prohibited, §4-88-107.

Unlawful practices, §4-88-107.

### **Appeals.**

Court orders for production of witnesses and evidence, §4-88-112.

### **Applicability of chapter, §4-88-101.**

### **Assistive device warranty,** §§4-105-201 to 4-105-206.

### **Attorney general. \***

Consumer advisory board, §4-88-106.

Enforcement.

Powers, §§4-88-111, 4-88-112.

Office of attorney general.

Consumer protection division, §4-88-105.

### **Caller identification service.**

Deceptive trade practices.

Defined, §4-88-102.

Fictitious or misleading names or telephone numbers.

Displaying resident's service, §4-88-107.

Telephone sellers.

Defined, §4-99-103.

Fictitious or misleading name or telephone number.

Displaying, §§4-99-103, 4-99-201.

### **Compliance with provisions.**

Voluntary compliance, §4-88-114.

### **Computer spyware.**

Consumer protection against computer spyware act, §§4-111-101 to 4-111-105.

## **CONSUMER PROTECTION —Cont'd** **Confidentiality of information.**

Deceptive trade practices.

Investigations, §4-88-111.

## **Construction and interpretation.**

Applicability of chapter, §4-88-101.

## **Consumer advisory board.**

Appointment, §4-88-106.

Chairman.

Election, §4-88-106.

Composition, §4-88-106.

Deceptive trade practices, §4-88-106.

Duties, §4-88-106.

Expenses of members, §4-88-106.

Number of members, §4-88-106.

Terms of members, §4-88-106.

## **Consumer credit.**

Equal consumer credit act, §§4-87-101 to 4-87-105.

## **Contempt.**

Court orders for production of witnesses and evidence.

Disobedience of order, §4-88-112.

## **Credit card processing services,** §§4-115-101 to 4-115-103.

## **Credit reporting disclosures.**

General provisions, §§4-93-101 to 4-93-104.

## **Credit report security freezes,** §§4-112-101 to 4-112-114.

## **Debt cancellation agreements,** §§4-90-701 to 4-90-705.

## **Deceptive trade practices.**

Advertising.

Bait and switch advertising, §4-88-107.

Applicability of chapter, §4-88-101.

Caller identification service.

Defined, §4-88-102.

Fictitious or misleading names or telephone numbers.

Displaying resident's service, §4-88-107.

Concealment, suppression or omission of material facts, §4-88-108.

Consumer advisory board, §4-88-106.

Disparaging goods, services or businesses of another, §4-88-107.

Division.

Consumer protection division, §4-88-105.

Enhanced penalties for targeting seniors and individuals with disabilities, §§4-88-201 to 4-88-207.

Enumeration, §4-88-107.

Home solicitation sales.

Definition of deceptive trade practices, §4-89-102.

**CONSUMER PROTECTION —Cont'd****Deceptive trade practices —Cont'd**

Injunctions, §4-88-104.

Investigations, §4-88-111.

Confidentiality of information,  
§4-88-111.

Failure to cooperate in  
investigations, §4-88-112.

Lemon law violations, §4-90-417.

Misrepresentation, §4-88-107.

Penalties, §4-88-103.

Pyramid schemes, §4-88-109.

Remedies, §4-88-113.

**Definitions, §4-88-102.**

Deceptive trade practices.

Enhanced penalties for targeting  
elderly and individuals with  
disabilities, §4-88-201.

Financial transaction cards, §4-59-501.

Home solicitation sales, §4-89-102.

**Disabilities, individuals with.**

Deceptive trade practices.

Enhanced penalties when targeting  
certain individuals, §§4-88-201  
to 4-88-207.

**Discount cards.**

Health-related discount cards,  
§§4-106-201 to 4-106-205.

**Division.**

Creation, §4-88-104.

Deceptive trade practices.

Consumer protection division,  
§4-88-105.

Director.

Appointment, §4-88-105.

Duties, §4-88-105.

Expenses, §4-88-105.

Powers, §4-88-105.

Staff.

Appointment, §4-88-105.

**Door to door sales.**

General provisions, §§4-89-101 to  
4-89-110.

**Electronic mail.**

Unsolicited commercial and sexually  
explicit electronic mail prevention  
act, §§4-88-601 to 4-88-607.

Authority of providers, §4-88-604.

Civil action, §4-88-606.

Criminal penalty, §4-88-605.

Definitions, §4-88-602.

Enforcement of provisions,  
§4-88-607.

Notice by recipient not to send  
future communications,  
§4-88-603.

**CONSUMER PROTECTION —Cont'd****Electronic mail —Cont'd**

Unsolicited commercial and sexually  
explicit electronic mail prevention  
act —Cont'd

Preexisting business or personal  
relationship with recipient.

Commercial mail not unsolicited,  
§4-88-603.

Requirements for sending,  
§4-88-603.

Short title, §4-88-601.

**Enforcement of provisions.**

Attorney general, §4-88-111.

Civil enforcement, §4-88-113.

**Equal consumer credit act.**

General provisions, §§4-87-101 to  
4-87-105.

**Evidence.**

Court order for production of evidence,  
§4-88-112.

Trade secrets.

Evidence held in camera, §4-88-111.

**Fair gift card act, §§4-88-701 to  
4-88-706.**

**Financial transaction cards.**

Record of sale.

Definitions, §4-59-501.

Felonies.

Remission to acquirer of record of  
sale not made by remitter,  
§4-59-502.

Solicitation of merchant to remit  
record of sale not made by the  
merchant, §4-59-503.

**Fraud.**

Financial transaction cards.

Remission to acquirer of record of  
sale not made by remitter,  
§4-59-502.

Solicitation of merchant to remit  
record of sale not made by the  
merchant, §4-59-503.

Prohibited acts, §§4-88-107, 4-88-108.

**Gifts.**

Fair gift card act, §§4-88-701 to  
4-88-706.

Unsolicited merchandise, §4-86-103.

**Health-related discount cards,  
§§4-106-201 to 4-106-205.**

**Health spas, §§4-94-101 to 4-94-109.**

**Home solicitation sales.**

General provisions, §§4-89-101 to  
4-89-110.

**Information technology.**

Consumer protection against computer  
spyware act, §§4-111-101 to  
4-111-105.

**CONSUMER PROTECTION —Cont'd****Information technology —Cont'd**

Personal information protection act,  
§§4-110-101 to 4-110-108.

**Injunctions.**

Powers of courts, §4-88-112.

Unlawful practices, §4-88-104.

**Investigations.**

Deceptive trade practices, §4-88-111.

Failure to cooperate in  
investigations, §4-88-112.

Powers and duties of consumer  
protection division, §4-88-105.

**Lemon law.**

Pet stores, §4-97-105.

**Liability.**

Product liability, §4-86-102.

Warranties.

Breach of warranty, §4-86-101.

**Limitation of actions, §4-88-115.****Mail and telephone solicitation sales.**

General provisions, §§4-95-101 to  
4-95-108.

**Misrepresentation.**

Deceptive trade practices, §4-88-107.

Concealment, suppression or  
omission of material facts,  
§4-88-108.

**Motor vehicles.**

Aftermarket crash parts.

General provisions, §§4-90-301 to  
4-90-307.

**No call lists.**

Consumer telephone privacy act,  
§§4-99-401 to 4-99-408.

**Notario or notario publico.**

Advertising services using terms.

Restrictions, §§4-109-101 to  
4-109-105.

**Pay per call, §§4-98-101 to 4-98-105.****Penalties.**

Civil penalties, §4-88-113.

Unlawful practices, §4-88-103.

**Pet lemon law, §4-97-105.****Price gouging during emergencies or disasters, §§4-88-301 to 4-88-305.**

Definitions, §4-88-302.

Penalties, remedies and enforcement,  
§4-88-304.

Preemption, §4-88-305.

Prohibited practices, §4-88-303.

Taking unfair advantage of consumers,  
§4-88-301.

**Private cause of action by persons suffering damage or injury, §4-88-113.****CONSUMER PROTECTION —Cont'd**  
**Privacy.**

Warranties.

Breach of warranty, §4-86-101.

**Products liability, §4-86-102.****Pyramid schemes, §4-88-109.****Sales.**

Breach of warranty liability,  
§4-86-101.

**School calendars.**

Disclosures by solicitors for  
advertisements on, §§4-88-501 to  
4-88-503.

**Service contracts, §§4-114-101 to 4-114-112.****Slamming in telecommunications industry, §§4-88-401 to 4-88-403.****Statute of limitations, §4-88-115.****Telephone.**

Pay per call, §§4-98-101 to 4-98-105.

**Trade secrets.**

Evidence held in camera, §4-88-111.

**Unlawful practices.**

Advertising.

Deceptive trade practices, §4-88-107.

Applicability of chapter, §4-88-101.

Concealment, suppression or omission  
of material facts, §4-88-108.

Deceptive trade practices, §4-88-107.

Fraud, §§4-88-107, 4-88-108.

Injunctions, §4-88-104.

Misdemeanors, §4-88-103.

Penalties, §4-88-103.

Pyramiding devices, §4-88-109.

**Unsolicited merchandise, §4-86-103.****Voluntary compliance with provisions, §4-88-114.****Warranties.**

Breach of warranty.

Liability, §4-86-101.

Privacy, §4-86-101.

**Witnesses.**

Court order to appear, §4-88-112.

**CONTAINERS.****Charitable solicitation, §§4-103-201 to 4-103-205.****CONTEMPT.****Consumer protection.**

Court orders for production of  
witnesses and evidence.

Disobedience of order, §4-88-112.

**CONTRACTS.****Assignments.**

Nonnegotiable instruments generally,  
§§4-58-101 to 4-58-110.

**CONTRACTS —Cont'd****Cigarettes and tobacco products.**

Unfair cigarette sales.

Contracts in violation of act void,  
§4-75-705.

**Construction contracts.**

Hold harmless clauses unenforceable,  
§4-56-104.

**Copyright royalty collection practices act, §§4-76-101 to 4-76-108.****Credit services organizations.**

Cancellation.

Notice, §4-91-109.

Requirements, §4-91-109.

**Fuel excise taxes imposed by federal law.**

Reimbursement required by contract provisions.

Option for reimbursement.

Exercise by reimbursing party,  
notice, §4-56-103.

**Gas, diesel and aviation fuel excise taxes imposed by federal law.**

Reimbursement required by contract provisions.

Option for reimbursement.

Exercise by reimbursing party,  
notice, §4-56-103.

**Hold harmless clauses.**

Construction contracts, §4-56-104.

**Home security services contracts.**

Automatic renewal, §4-86-106.

**Home solicitation sales.**

Excepted contracts, §4-89-103.

**Interest.**

Maximum rate of interest by contract,  
§4-57-104.

**Monopolies and restraint of trade.**

Automobile dealer's anti-coercion act.

Voidness of contracts violating  
subchapter, §4-75-407.

Unfair practices.

No recovery on contract violating  
act, §4-75-206.

**Motor vehicles.**

Arbitration and forum selection  
clauses in sales contracts,  
§4-75-413.

Service contracts, §§4-90-501 to  
4-90-512.

**Oil and gas.**

Petroleum products franchises.

Cancellation of contracts.

General provisions, §§4-72-401 to  
4-72-503.

**CONTRACTS —Cont'd****Pets.**

Retail pet stores.

Written contract requirements,  
§4-97-105.

**Sales representatives.**

Payment in absence of contract.

Time limitation, §4-70-303.

Damages, attorney's fees and  
costs.

Failure to pay commission  
within time allowed,  
§4-70-306.

Sales representatives' contracts,  
§4-70-302.

Waiver of provisions of subchapter.

Prohibited, §4-70-305.

**Service contracts.**

Generally, §§4-114-101 to 4-114-112.

Motor vehicles, §§4-90-501 to 4-90-512.

**Statute of frauds, §§4-59-101 to 4-59-103.****CONVERSION.**

Limited partnerships, §§4-47-1101 to  
4-47-1113.

**CONVERSION OF INSTITUTIONS.**

Partnerships, §§4-46-901 to 4-46-913.

**CONVEYANCES.**

Fraudulent conveyances, §§4-59-201  
to 4-59-213.

**COPYRIGHTS.**

Royalty collection practices act,  
§§4-76-101 to 4-76-108.

Applicability of provisions, §4-76-108.

Collection of payments outside of  
contract, §4-76-105.

Definitions, §4-76-102.

Form of contract, §4-76-104.

Information to be made available prior  
to contracting, §4-76-103.

Injunction of violations, §4-76-107.

Prohibited practices, §4-76-106.

Short title, §4-76-101.

**CORPORATIONS.****Assumed names.**

Business under assumed name.

Exception to provisions, §4-70-201.

**Monopolies and restraint of trade.**

Unfair practices.

Forfeiture of charter, §4-75-205.

Officers, directors, agents and  
employees, §§4-75-209, 4-75-210.

**COSTS.**

Lemon law, §4-90-415.

**Limited partnerships.**

Derivative actions, §4-47-1005.

**COSTS —Cont'd**

**Odometer tampering, action for,**  
§4-90-207.

**Pay per call.**

Consumer remedies, §4-98-105.

**Sales representatives.**

Noncompliance with provisions  
relating to payment of  
commission, §4-70-306.

**CREDIT CARDS.****Account numbers.**

Printing numbers on receipts,  
§4-107-303.  
Credit card defined, §4-107-302.  
Legislative findings, §4-107-301.

**College campus, solicitations on campus, §§4-104-201 to 4-104-204.**

Athletic events, solicitations at.  
Credit seminar within institutions  
freshman orientation,  
§4-104-203.

Definitions, §4-104-201.

Face-to-face solicitations, §4-104-202.

Fine for violation, §4-104-204.

Misdemeanor for violation, §4-104-204.

Personal solicitation of credit card  
application, §4-104-202.

**Factoring, §§4-59-501 to 4-59-503.****Financial transaction cards.**

Records of sale, §§4-59-501 to  
4-59-503.

**Numbers.**

Consumer protection against computer  
spyware act, §§4-111-101 to  
4-111-105.

Personally identifiable information  
defined, §4-111-102.

Personal information protection act,  
§§4-110-101 to 4-110-108.

**Printing card numbers on receipts, §4-107-303.**

Credit card defined, §4-107-302.

Legislative findings, §4-107-301.

**Processing services, §§4-115-101 to 4-115-103.**

Disclosures required, §4-115-101.

Exclusion from provisions, §4-115-103.

Penalty for violations, §4-115-102.

**Transfer of card balance from one card account to another, §§4-107-201 to 4-107-204.**

Cardholder protection, §4-107-202.  
Definitions, §4-107-201.

Interest or other fees.  
Applicability, §4-107-204.

Deceptive trade practice, violations,  
§4-107-203.

**CREDIT CARDS —Cont'd****Transfer of card balance from one card account to another —Cont'd**

Interest or other fees —Cont'd

Remedies and penalties, §4-107-203.

Restrictions on charging cardholder,  
§4-107-202.

**CREDIT REPAIR COMPANIES,**

§§4-91-101 to 4-91-109.

**CREDIT REPORTING**

**DISCLOSURES, §§4-93-101 to 4-93-104.**

**Citation of chapter.**

Title, §4-93-101.

**Damages.**

Notice of adverse action.

Failure to provide, §4-93-104.

**Definitions, §4-93-102.****Denial of credit, etc.**

Notice of adverse action.

Contents of notice, §4-93-103.

Damages for failure to provide  
notice, §4-93-104.

Responsibility of user of consumer  
report, §4-93-103.

**Notice.**

Denial of credit, further extension or  
increase in limits of existing  
credit.

Contents of notice of adverse action,  
§4-93-104.

Responsibility of user of consumer  
report to notify consumer of  
adverse action, §4-93-103.

Damages for failure to provide  
notification, §4-93-104.

**Title of chapter, §4-93-101.****CREDIT REPORT SECURITY**

**FREEZES, §§4-112-101 to 4-112-114.**

**Access to report while freeze in place, §4-112-104.****Action for noncompliance, §4-112-112.****Advising third party of existence of security freeze, §4-112-114.****Changes while freeze in place.**

Written confirmation required,  
§4-112-109.

**Confirmation of placement, §4-112-103.****Definitions, §4-112-102.****Enforcement of provisions, §4-112-113.****Entities not required to place freeze, §4-112-110.**

**CREDIT REPORT SECURITY****FREEZES —Cont'd**

**Exclusions from provisions,**  
§4-112-107.

**Fees charged by agency,** §4-112-108.

**Notice of rights,** §4-112-111.

**Notice of unauthorized access,**  
§4-112-104.

**Placement by agency,** §4-112-103.

**Remedies available to attorney  
general,** §4-112-113.

**Removal of freeze,** §4-112-105.

Consumer request for, §4-112-106.

**Request by consumer.**

Placement, §4-112-103.

Removal, §4-112-106.

**Temporary lift on freeze,** §§4-112-104,  
4-112-105.

**Third party request for access while  
in place,** §4-112-105.

**Title of provisions,** §4-112-101.

**CRIMINAL LAW AND PROCEDURE.****Bills of lading.**

False statements, §4-59-302.

Issuance for goods not received,  
§4-59-301.

Negotiation of bill for unowned goods,  
§4-59-306.

**Collection practices.**

Telephone solicitations, §4-99-202.

**Conspiracy.**

Monopolies and restraint of trade.

Fixing prices of quantity of products.

Prohibited, §4-75-309.

Lawful commerce excepted,  
§4-75-303.

**Credit cards.**

Factoring, §4-59-503.

Solicitation on college campus,  
§4-104-204.

**Diamonds.**

Sale of fracture-filled and  
clarity-enhanced diamonds,  
§4-101-201.

**Electronic mail.**

Unsolicited commercial and sexually  
explicit electronic mail, §4-88-605.

**Jewelers.**

Sale of fracture-filled and  
clarity-enhanced diamonds,  
§4-101-201.

**Odometer violations,** §4-90-203.

**Oil and gas.**

Quality specifications for engine fuels,  
petroleum products and  
automotive lubricants, §4-108-209.

**Price gouging during emergencies,**  
§4-88-304.

**CRIMINAL LAW AND PROCEDURE****—Cont'd****Prizes.**

Telephone offer of prize to consumer.

Dispatching courier to consumer's  
home to collect fees or costs  
prohibited, §4-99-202.

**Secured transactions.**

Security interests in certain farm  
products, §4-56-102.

**Spam.**

Unsolicited commercial and sexually  
explicit electronic mail, §4-88-605.

**Telecommunications.**

Telephone sellers.

Collection practices, §4-99-202.

**Unsolicited commercial and sexually  
explicit electronic mail,**  
§4-88-605.

**Warehouse receipts.**

Delivering goods without obtaining  
negotiable receipt, §4-59-405.

Fraudulent issuance.

Containing false statement,  
§4-59-402.

Issuance without statement of  
ownership, §4-59-404.

Negotiation of receipt by depositor of  
encumbered goods without  
disclosing facts, §4-59-406.

**CRUELTY TO ANIMALS.****Retail pet stores.**

General provisions, §§4-97-101 to  
4-97-109.

Posting of public notice, §4-97-108.

Failure to post public notice as  
misdemeanor, §4-97-108.

**D****DAMAGES.****Cigarettes and tobacco products.**

Unfair cigarette sales.

Violations of provisions, §4-75-713.

**Consumer credit.**

Equal consumer credit act.

Violations, §4-87-105.

**Copyright collection practices,**

§4-76-107.

**Credit reporting disclosures.**

Notice of adverse action.

Failure to provide, §4-93-104.

**Credit report security freezes.**

Action for noncompliance, §4-112-112.

**Credit services organizations.**

Violation of chapter, §4-91-105.

**DAMAGES —Cont'd****Electronic mail.**

Unsolicited commercial and sexually explicit electronic mail, §4-88-606.

**Franchises.**

Franchisee's remedies, §4-72-208.

**Home solicitation sales.**

Violations of provisions, §4-89-105.

**Limited partnerships.**

Dissociation.

General partners, wrongful dissociation, §4-47-604.

False information in records, damages caused in reliance on, §4-47-208.

**Milk and milk products.**

Unfair trade practices.

Violations of provisions, §4-75-809.

**Monopolies and restraint of trade.**

Actions by attorney general, §4-75-315.

Automobile dealer's anti-coercion act.

Double damages.

Actions by injured parties for double damages, §4-75-412.

Discrimination.

News furnishing.

Recovery by those discriminated against, §4-75-503.

Unfair practices.

Action by attorney general, §4-75-212.

Violations of provisions, §4-75-211.

**Odometer tampering.**

Treble damages, §4-90-207.

**Partnerships.**

Wrongful dissociation, liability, §4-46-602.

**Rental purchases.**

Liability of lessor, §4-92-103.

**Sales representatives.**

Noncompliance with provisions relating to payment of commission, §4-70-306.

**Spam.**

Unsolicited commercial and sexually explicit electronic mail, §4-88-606.

**Telephone and telegraph companies.**

Pay per call act.

Action for recovery to damages, §4-98-105.

**Trademarks.**

Violations of subchapter, §4-71-214.

**Trade secrets.**

Misappropriation, §4-75-606.

**Unsolicited commercial and sexually explicit electronic mail,**  
§4-88-606.

**DEATH.****Franchises.**

Farm equipment retailer franchise protection.

Death of retailer equivalent to termination, §4-72-306.

**Limited partnerships.**

Disposition of assets at dissolution, liability of estate, §4-47-812.

Powers of estate of deceased partner, §4-47-704.

**DEBIT CARDS.****Numbers.**

Consumer protection against computer spyware act, §§4-111-101 to 4-111-105.

Personally identifiable information defined, §4-111-102.

Personal information protection act, §§4-110-101 to 4-110-108.

**Printing card numbers on receipts,**  
§4-107-303.

Credit card defined, §4-107-302.

Legislative findings, §4-107-301.

**DEBT CANCELLATION**

**AGREEMENTS,** §§4-90-701 to 4-90-705.

**Deceptive trade practices,**  
**applicability of provisions,**  
§4-90-705.

**Definition,** §4-90-701.

**Disclosures,** §4-90-703.

**Legibility,** §4-90-703.

**Prohibitions,** §4-90-704.

**Requiring debtor to purchase,**  
§4-90-702.

**DEBT COUNSELING AND CREDIT SERVICES ORGANIZATIONS.**

**Citation of chapter,** §4-91-101.

**Contracts.**

Cancellation.

Notice, §4-91-109.

Requirements, §4-91-109.

**Damages.**

Violation of chapter, §4-91-105.

**Definitions,** §4-91-102.

**Information statements.**

Contents, §4-91-108.

Requirements, §4-91-107.

**Penalties.**

Violation of chapter, §4-91-104.

**Prohibited acts,** §4-91-106.

**Title of chapter,** §4-91-101.

**Violation of chapter.**

Damages, §4-91-105.

Penalties, §4-91-104.

## **DEBT COUNSELING AND CREDIT SERVICES ORGANIZATIONS**

—Cont'd

### **Violation of chapter —Cont'd**

Prohibited acts, §4-91-106.

### **Waiver of rights.**

Prohibited, §4-91-103.

Void, §4-91-103.

## **DEBTOR AND CREDITORS.**

### **Debt cancellation agreements,**

§§4-90-701 to 4-90-705.

### **Limited partnerships.**

Assets, disposition at dissolution,  
§4-47-812.

Claims against general partner,  
barring of, §4-47-808.

Claims known at time of dissolution,  
§4-47-806.

Claims not known at time of  
dissolution, §4-47-807.

Transferable interests.

Creditor's rights, §4-47-703.

### **Reports.**

Credit reporting disclosures,  
§§4-93-101 to 4-93-104.

Credit report security freezes,  
§§4-112-101 to 4-112-114.

## **DEBTS.**

### **Cancellation agreements, §§4-90-701 to 4-90-705.**

### **Minors.**

Statute of frauds.

Promise to pay debt contracted  
during infancy.

Writing required, §4-59-101.

### **Statute of frauds.**

Promise to answer for debt of another.

Writing required, §4-59-101.

Promise to pay debt contracted during  
infancy.

Writing required, §4-59-101.

## **DECEDENTS' ESTATES.**

### **Franchises.**

Farm equipment.

Retailer's death, §4-72-306.

Franchisor restrictions, §4-72-206.

### **Limited partnerships.**

Disposition of assets at dissolution,  
liability of estate, §4-47-812.

Powers of estate of deceased partner,  
§4-47-704.

## **DECLARATORY JUDGMENTS.**

### **Monopolies and restraint of trade.**

Actions by attorney general, §4-75-315.

Unfair practices, §4-75-212.

## **DEFENSES.**

### **Assignments.**

Nonnegotiable instruments.

Retention of defenses, §§4-58-101,  
4-58-105.

### **Electronic mail.**

Unsolicited commercial and sexually  
explicit electronic mail, §4-88-606.

### **Fraudulent conveyances.**

Protection of transferee, §4-59-208.

### **Lemon law.**

Affirmative defenses, §4-90-413.

### **Spam.**

Unsolicited commercial and sexually  
explicit electronic mail, §4-88-606.

### **Unsolicited commercial and sexually explicit electronic mail, §4-88-606.**

## **DEFINED TERMS.**

### **Abandoned.**

Trademarks, §4-71-201.

### **Acquirer.**

Financial transaction cards, §4-59-501.

### **Administrators.**

Service contracts, §4-114-103.

### **Advertisement.**

Consumer protection against computer  
spyware act, §4-111-102.

Rental purchases, §4-92-102.

### **Affiliate.**

Fraudulent transfers, §4-59-201.

### **Aftermarket crash part.**

Automobiles, §4-90-302.

### **Agreement.**

Statute of frauds, §4-59-101.

### **Animal.**

Pet stores, §4-97-103.

### **Applicant.**

Trademarks, §4-71-201.

### **Appropriate trade premises.**

Home solicitation sales, §4-89-102.

### **Art.**

Artists' consignment, §4-73-202.

### **Art dealer.**

Artists' consignment, §4-73-202.

### **Artist.**

Artists' consignment, §4-73-202.

Fine prints sales, §4-73-301.

### **Asset.**

Fraudulent transfers, §4-59-201.

### **Assistive device, §4-105-201.**

### **Assistive device dealer, §4-105-201.**

### **Assistive device lessor, §4-105-201.**

### **Assistive device warranty, §4-105-201.**

### **ASTM.**

Quality specifications for engine fuels,  
petroleum products and  
automotive lubricants, §4-108-203.

**DEFINED TERMS —Cont'd****Auction company.**

Odometer regulations, §4-90-202.

**Authorized distributors of record.**

Drug samples, distribution of,  
§4-117-101.

**Authorized person.**

Pet stores, §4-97-103.

**Authorized user.**

Consumer protection against computer  
spyware act, §4-111-102.

**Automotive lubricants.**

Quality specifications for engine fuels,  
petroleum products and  
automotive lubricants, §4-108-203.

**Basic cost of cigarettes.**

Unfair cigarette sales, §4-75-702.

**Bids.**

Motion pictures.

Unfair practices, §4-75-902.

**Blind bidding.**

Motion pictures.

Unfair practices, §4-75-902.

**Board.**

Drug samples, distribution of,  
§4-117-101.

**Breach of the security of the system.**

Personal information protection act,  
§4-110-103.

**Broadband, §4-113-102.****Broadband backbone, §4-113-102.****Building materials.**

Price gouging, §4-88-302.

**Bundled software.**

Consumer protection against computer  
spyware act, §4-111-102.

**Business.**

Partnerships, §4-46-101.

Personal information protection act,  
§4-110-103.

**Buy.**

Automobile dealers' anti-coercion,  
§4-75-402.

**Buyer.**

Credit service organizations,  
§4-91-102.

Health spa consumer protection,  
§4-94-102.

**Buying pool.**

Unfair cigarette sales, §4-75-702.

**Calendar day.**

Motor vehicle warranties, §4-90-403.

**Caller identification service.**

Caller identification blocking by  
telephonic sellers, §4-99-301.

Deceptive trade practices, §4-88-102.

Telephone sellers, §4-99-103.

**DEFINED TERMS —Cont'd****Cardholder.**

Financial transaction cards.

Fraud, §4-59-501.

Transfer of credit card debt,  
§4-107-201.

**Card issuer.**

Transfer of credit card debt,  
§4-107-201.

**Cattery.**

Pet stores, §4-97-103.

**Cause to be copied.**

Consumer protection against computer  
spyware act, §4-111-102.

**Certificate of limited partnership,  
§4-47-102.****Charitable organization.**

Caller identification blocking by  
telephonic sellers, §4-99-301.

Containers, §4-103-201.

Deceptive trade practices, §4-88-102.

**Charitable purpose.**

Containers, §4-103-201.

**Check, §4-60-101.****Cigarette.**

Unfair sales, §4-75-702.

**Claim.**

Fraudulent transfers, §4-59-201.

**Collateral charges.**

Motor vehicle warranties, §4-90-403.

**Collateral costs.**

Assistive device warranty, §4-105-201.

**Commercial.**

Unsolicited commercial and sexually  
explicit electronic mail prevention  
act, §4-88-602.

**Commission.**

Sales representatives, §4-70-301.

**Compensation.**

Deceptive trade practices, §4-88-109.

**Computer network.**

Unsolicited commercial and sexually  
explicit electronic mail prevention  
act, §4-88-602.

**Computer software.**

Consumer protection against computer  
spyware act, §4-111-102.

**Computer virus.**

Consumer protection against computer  
spyware act, §4-111-102.

**Condition.**

Motor vehicle warranties, §4-90-403.

**Constituent limited partnership,  
§4-47-1101.****Constituent organization.**

Limited partnerships, conversion and  
merger, §4-47-1101.

**DEFINED TERMS —Cont'd****Constituent organization —Cont'd**

Partnerships, conversions and mergers, §4-46-901.

**Constituent partnership.**

Partnerships, conversions and mergers, §4-46-901.

**Consumer.**

Assistive device warranty, §4-105-201.

Caller identification blocking by telephonic sellers, §4-99-301.

Credit report security freezes, §4-112-102.

Motor vehicle warranties, §4-90-403.

Pet stores, §4-97-103.

Refund anticipation loans, §4-116-102.

Rental purchases, §4-92-102.

Service contracts, §4-114-103.

**Consumer food item.**

Price gouging, §4-88-302.

**Consumer product.**

Mail and telephone solicitation sales, §4-95-102.

**Consumer report.**

Credit report security freezes, §4-112-102.

**Consumer reporting agency.**

Credit report security freezes, §4-112-102.

**Container.**

Charitable solicitation, §4-103-201.

**Contract for health spa services.**

Health spa consumer protection, §4-94-102.

**Contribution.**

Deceptive trade practices, §4-88-102.

Limited partnerships, §4-47-102.

**Converted organization.**

Limited partnerships, §4-47-1101.

Partnerships, conversions and mergers, §4-46-901.

**Converting limited partnership, §4-47-1101.****Converting organization.**

Limited partnerships, §4-47-1101.

Partnerships, conversions and mergers, §4-46-901.

**Converting partnership.**

Partnerships, conversions and mergers, §4-46-901.

**Copyright owner.**

Collection practices, §4-76-102.

**Cost of doing business.**

Unfair practices, §4-75-209.

**Costs.**

Milk and dairy products.

Unfair practices, §4-75-802.

Unfair practices, §4-75-209.

**DEFINED TERMS —Cont'd****Cost to the retailer.**

Unfair cigarette sales, §4-75-702.

**Cost to wholesaler.**

Unfair cigarette sales, §4-75-702.

**Credit.**

Statute of frauds, §4-59-101.

Transfer of credit card debt, §4-107-201.

**Credit card.**

Printing account number on receipts, §4-107-302.

Solicitation on college campus, §4-104-201.

Transfer of credit card debt, §4-107-201.

**Credit card issuer.**

Solicitation of credit card on college campus, §4-104-201.

**Creditor.**

Fraudulent transfers, §4-59-201.

Refund anticipation loans, §4-116-102.

Transfer of credit card debt, §4-107-201.

**Credit report.**

Credit report security freezes, §4-112-102.

**Credit services organization, §4-91-102.****Current model.**

Farm equipment retailer franchise protection, §4-72-301.

**Current net price.**

Farm equipment retailer franchise protection, §4-72-301.

**Customer.**

Personal information protection act, §4-110-103.

**Damages.**

Consumer protection against computer spyware act, §4-111-102.

**Dealer.**

Odometer regulations, §4-90-202.

**Dealership agreement.**

Farm equipment retailer franchise protection, §4-72-301.

**Debit card.**

Fair gift card act, §4-88-702.

**Debt.**

Fraudulent transfers, §4-59-201.

**Debt cancellation agreement, §4-90-701.****Debtor.**

Fraudulent transfers, §4-59-201.

**Debtor in bankruptcy.**

Limited partnerships, §4-47-102.

Partnerships, §4-46-101.

**DEFINED TERMS —Cont'd****Deceptive trade practices.**

Home solicitation sales, §4-89-102.

**Demonstrator.**

Assistive device warranties,  
§4-105-201.

**Designated office.**

Limited partnerships, §4-47-102.

**Dilution.**

Trademarks, §4-71-201.

**Disabled person.**

Deceptive trade practices.  
Enhanced penalties, §4-88-201.

**Disclosure label.**

Charitable solicitation, §4-103-201.

**Distribute.**

Drug samples, distribution of,  
§4-117-101.

**Distributed denial of service (DDoS).**

Consumer protection against computer  
spyware act, §4-111-102.

**Distribution.**

Limited partnerships, §4-47-102.  
Partnerships, §4-46-101.

**Distributor.**

Motion pictures.  
Unfair practices, §4-75-902.  
Odometer regulations, §4-90-202.

**Dormancy fee.**

Fair gift card act, §4-88-702.

**Drawee.**

Checks, §4-60-101.

**Drawer.**

Checks, §4-60-101.

**Drug.**

Drug samples, distribution of,  
§4-117-101.

**Drug sample.**

Prescription drugs, §4-117-101.

**D.V.M.**

Pet stores, §4-97-103.

**Early termination cost.**

Assistive device warranty, §4-105-201.

**Early termination saving.**

Assistive device warranty, §4-105-201.

**Elderly person.**

Deceptive trade practices.  
Enhanced penalties, §4-88-201.

**Electronic mail.**

Unsolicited commercial and sexually  
explicit electronic mail prevention  
act, §4-88-602.

**Electronic mail address.**

Unsolicited commercial and sexually  
explicit electronic mail prevention  
act, §4-88-602.

**Emergency supplies.**

Price gouging, §4-88-302.

**DEFINED TERMS —Cont'd****Engine fuel.**

Quality specifications for engine fuels,  
petroleum products and  
automotive lubricants, §4-108-203.

**Engine fuel designed for special use.**

Quality specifications for engine fuels,  
petroleum products and  
automotive lubricants, §4-108-203.

**Euthanasia.**

Pet stores, §4-97-103.

**Execute.**

Consumer protection against computer  
spyware act, §4-111-102.

**Exhibitor.**

Motion pictures.  
Unfair practices, §4-75-902.

**Exhibit or exhibition.**

Motion pictures.  
Unfair practices, §4-75-902.

**Extension of credit.**

Credit services organizations,  
§4-91-102.

**Facilitator.**

Refund anticipation loans, §4-116-102.

**Financial institution.**

Fair gift card act, §4-88-702.

**Financial transaction card.**

Fraud, §4-59-501.

**Fine print.**

Sales of fine prints, §4-73-301.

**First run.**

Motion pictures, §4-75-902.

**Foreign limited liability  
partnership.**

Limited partnerships, §4-47-102.  
Partnerships, §4-46-101.

**Foreign limited partnership,  
§4-47-102.****Franchise, §4-72-202.**

Petroleum products suppliers, dealers  
and distributors, §4-72-501.  
Petroleum suppliers and distributors,  
§4-72-401.

**Franchisee.**

Franchises, §4-72-202.  
Restaurant franchises, §4-72-601.

**Franchisor.**

Franchises, §4-72-202.  
Restaurant franchises, §4-72-601.

**GAP waiver agreement.**

Debt cancellation agreements,  
§4-90-701.

**Gasoline.**

Price gouging, §4-88-302.

**General partner.**

Limited partnerships, §4-47-102.  
Conversion and merger, §4-47-1101.

**DEFINED TERMS —Cont'd****General use prepaid card.**

Fair gift card act, §4-88-702.

**Gift certificate.**

Fair gift card act, §4-88-702.

**Gift or prize.**

Mail and telephone solicitation sales,  
§4-95-102.

**Going out of business sale, §4-74-101.****Good cause.**

Franchises, §4-72-202.

**Good faith.**

Franchises, §4-72-202.

**Goods.**

Deceptive trade practices, §4-88-102.

Home solicitation sales, §4-89-102.

Price gouging, §4-88-302.

**Governing statute.**

Limited partnerships, conversion and  
merger, §4-47-1101.

Partnerships, conversions and  
mergers, §4-46-901.

**Gross invoice cost.**

Unfair cigarette sales act, §4-75-702.

**Guaranteed automobile protection  
waiver agreement.**

Debt cancellation agreements,  
§4-90-701.

**Hardware.**

Consumer protection against computer  
spyware act, §4-111-102.

**Harmful to minors.**

Unsolicited commercial and sexually  
explicit electronic mail prevention  
act, §4-88-602.

**Health spa.**

Consumer protection, §4-94-102.

**Holder.**

Motor vehicle service contracts,  
§4-90-502.

**Home solicitation sale, §4-89-102.****Housing.**

Price gouging, §4-88-302.

**Impression.**

Fine prints sales, §4-73-301.

**Improper means.**

Theft of trade secrets, §4-75-601.

**Inactivity charge or fee.**

Fair gift card act, §4-88-702.

**In a record.**

Partnerships, conversions and  
mergers, §4-46-901.

**Incidental charges.**

Motor vehicle warranties, §4-90-403.

**Individual.**

Personal information protection act,  
§4-110-103.

**DEFINED TERMS —Cont'd****Information provider.**

Pay per call consumer protection,  
§4-98-102.

**Insider.**

Fraudulent transfers, §4-59-201.

**Installer.**

Aftermarket crash parts, §4-90-302.

**Institution of higher education.**

Credit card solicitation on college  
campus, §4-104-201.

**Insurer.**

Aftermarket crash parts, §4-90-302.

**Intentionally deceptive.**

Consumer protection against computer  
spyware act, §4-111-102.

**Interactive computer service.**

Unsolicited commercial and sexually  
explicit electronic mail prevention  
act, §4-88-602.

**Internet.**

Consumer protection against computer  
spyware act, §4-111-102.

**Internet address.**

Consumer protection against computer  
spyware act, §4-111-102.

**Internet domain name.**

Unsolicited commercial and sexually  
explicit electronic mail prevention  
act, §4-88-602.

**Inventory.**

Farm equipment retailer franchise  
protection, §4-72-301.

**Invitation for bids.**

Motion pictures, §4-75-902.

**Issue.**

Checks, §4-60-101.

**Issuer.**

Financial transaction cards.  
Fraud, §4-59-501.

**Item.**

Telephonic sellers, §4-99-103.

**Juristic person.**

Trademarks, §4-71-201.

**Kennel.**

Pet stores, §4-97-103.

**Last mile broadband.**

Connect Arkansas broadband program,  
§4-113-102.

**Lease.**

Motor vehicle transfers, §4-100-101.

**Leased motor vehicle.**

Odometer regulations, §4-90-202.

**Lease price.**

Motor vehicle warranties, §4-90-403.

**Lessee.**

Motor vehicle warranties, §4-90-403.

**DEFINED TERMS —Cont'd****Lessee cost.**

Motor vehicle warranties, §4-90-403.

**Lessor.**

Motor vehicle warranties, §4-90-403.

Rental purchases, §4-92-102.

**License agreement.**

Motion pictures.

Unfair practices, §4-75-902.

**Licensed pharmacist.**

Drug samples, distribution of,  
§4-117-101.

**Lien.**

Fraudulent transfers, §4-59-201.

**Limited liability limited  
partnership, §4-47-102.****Limited liability partnership,  
§4-46-101.****Limited partner, §4-47-102.****Limited partnership, §4-47-102.****Local emergency.**

Price gouging, §4-88-302.

**Maintenance agreement.**

Service contracts, §4-114-103.

**Major life activities.**

Deceptive trade practices.

Enhanced penalties, §4-88-201.

**Manufacturer.**

Assistive device warranty, §4-105-201.

Farm equipment retailer franchise  
protection, §4-72-301.

Motor vehicle warranties, §4-90-403.

Service contracts, §4-114-103.

**Manufacturer promotional  
allowance.**

Unfair cigarette sales act, §4-75-702.

**Mark.**

Trademarks and labels, §4-71-201.

**Mechanical breakdown insurance.**

Motor vehicle service contracts,  
§4-90-502.

Service contracts, §4-114-103.

**Medical information.**

Personal information protection act,  
§4-110-103.

**Medical supplies.**

Price gouging, §4-88-302.

**Merchandise.**

Rental purchases, §4-92-102.

**Misappropriation.**

Theft of trade secrets, §4-75-601.

**Monopoly, §4-75-301.****Motor vehicle.**

Odometer regulations, §4-90-202.

Service contracts, §4-90-502.

Transfers, §4-100-101.

Warranties, §4-90-403.

**DEFINED TERMS —Cont'd****Motor vehicle quality assurance  
period, §4-90-403.****Motor vehicle service contract,  
§4-90-502.****Motor vehicle service contract  
provider, §4-90-502.****Motor vehicle service contract  
reimbursement insurance policy,  
§4-90-502.****Motor vehicle transfers, §4-100-101.****Net cost.**

Farm equipment retailer franchise  
protection, §4-72-301.

**Nonconformity.**

Assistive device warranty, §4-105-201.

Motor vehicle warranties, §4-90-403.

**Nonoriginal equipment  
manufacturer aftermarket crash  
part, §4-90-302.****Nonoriginal manufacturer's parts.  
Service contracts, §4-114-103.****Notary public.**

Notario or notario publico.

Advertising services using terms,  
§4-109-101.

**Odometer, §4-90-202.****On consignment.**

Artists' consignment, §4-73-202.

**Open-end credit plan.**

Transfer of credit card debt,  
§4-107-201.

**Organization.**

Limited partnerships, conversion and  
merger, §4-47-1101.

Partnerships, conversions and  
mergers, §4-46-901.

**Organizational documents.**

Limited partnerships, conversion and  
merger, §4-47-1101.

Partnerships, conversions and  
mergers, §4-46-901.

**Overhead expense.**

Unfair practices, §4-75-209.

**Owner.**

Telephonic sellers, §4-99-103.

**Owns or licenses.**

Personal information protection act,  
§4-110-103.

**Participant.**

Connect Arkansas broadband program,  
§4-113-102.

**Partner.**

Limited partnerships, §4-47-102.

**Partnership.**

Partnerships, §4-46-101.

**Partnership agreement.**

Limited partnerships, §4-47-102.

**DEFINED TERMS —Cont'd****Partnership agreement —Cont'd**

Partnerships, §4-46-101.

**Partnership at will.**

Partnerships, §4-46-101.

**Partnership interest.**

Partnerships, §4-46-101.

**Pay-per-call.**Mail and telephone solicitation sales,  
§4-95-102.**Pay-per-call service.**

Consumer protection, §4-98-102.

**PBM.**Fair disclosure of state funded  
payments for pharmacists'  
services act, §4-88-802.**Per-call blocking.**Caller identification blocking by  
telephonic sellers, §4-99-301.**Performing rights society.**

Collection practices, §4-76-102.

**Per-line blocking.**Caller identification blocking by  
telephonic sellers, §4-99-301.**Person.**Advertisements on school calendars,  
§4-88-501.Automobile dealers' anti-coercion,  
§4-75-402.Caller identification blocking by  
telephonic sellers, §4-99-301.Consumer protection against computer  
spyware act, §4-111-102.Credit card solicitation on college  
campus, §4-104-201.

Deceptive trade practices, §4-88-102.

Franchises, §4-72-202.

Fraudulent transfers, §4-59-201.

Going out of business sales, §4-74-101.

Lemon law, §4-90-403.

Limited partnerships, §4-47-102.

Mail and telephone solicitation sales,  
§4-95-102.Misappropriating social security  
numbers, §4-86-107.Monopolies and restraint of trade,  
§4-75-316.

Motion pictures.

Unfair practices, §4-75-902.

Motor vehicle warranties, §4-90-403.

Notario or notario publico.

Advertising services using terms,  
§4-109-101.

Odometer regulations, §4-90-202.

Partnerships, §4-46-101.

Pet stores, §4-97-103.

Price gouging, §4-88-302.

**DEFINED TERMS —Cont'd****Person —Cont'd**Quality specifications for engine fuels,  
petroleum products and  
automotive lubricants, §4-108-203.

Rental purchases, §4-92-102.

Service contracts, §4-114-103.

Slamming in telecommunications  
industry, §4-88-401.

Telephonic sellers, §4-99-103.

Theft of trade secrets, §4-75-601.

Trademarks and labels, §4-71-201.

Transfer of credit card debt,  
§4-107-201.

Unfair cigarette sales, §4-75-702.

Unfair practices, §4-75-213.

Unsolicited commercial and sexually  
explicit electronic mail prevention  
act, §4-88-602.Usurious consumer loans or credit  
sales, §4-57-108.**Personal information.**Personal information protection act,  
§4-110-103.**Personal liability.**Limited partnerships, conversion and  
merger, §4-47-1101.Partnerships, conversions and  
mergers, §4-46-901.**Personally identifiable information.**Consumer protection against computer  
spyware act, §4-111-102.**Person dissociated as a general partner.**

Limited partnerships, §4-47-102.

**Petroleum products.**Quality specifications for engine fuels,  
petroleum products and  
automotive lubricants, §4-108-203.**Petroleum products dealer,**  
§4-72-501.**Petroleum products distributor,**  
§§4-72-401, 4-72-501.**Petroleum products supplier,**  
§§4-72-401, 4-72-501.**Pharmacist.**Fair disclosure of state funded  
payments for pharmacists'  
services act, §4-88-802.**Pharmacist services.**Fair disclosure of state funded  
payments for pharmacists'  
services act, §4-88-802.**Pharmacy.**Drug samples, distribution of,  
§4-117-101.Fair disclosure of state funded  
payments for pharmacists'  
services act, §4-88-802.

**DEFINED TERMS —Cont'd****Pharmacy benefits manager.**

Fair disclosure of state funded payments for pharmacists' services act, §4-88-802.

**Pharmacy benefits plan or program.**

Fair disclosure of state funded payments for pharmacists' services act, §4-88-802.

**Phishing.**

Consumer protection against computer spyware act, §4-111-102.

**Physical or mental impairment.**

Deceptive trade practices, §4-88-201.

**Physician.**

Drug samples, distribution of, §4-117-101.

**Place of business.**

Franchises, §4-72-202.

**Plate.**

Fine prints sales, §4-73-301.

**Practice of law.**

Notario or notario publico.  
Advertising services using terms, §4-109-101.

**Preexisting business relationship.**

Unsolicited commercial and sexually explicit electronic mail prevention act, §4-88-602.

**Premiums.**

Service contracts, §4-114-103.

**Principal.**

Sales representatives, §4-70-301.  
Telephone sellers, §§4-99-102, 4-99-103.

**Principal office.**

Limited partnerships, §4-47-102.

**Prize, §4-102-102.****Product promoter.**

Mail and telephone solicitation sales, §4-95-102.

**Promotion.**

Deceptive trade practices, §4-88-102.

**Proper identification.**

Credit report security freezes, §4-112-102.

**Property.**

Fraudulent transfers, §4-59-201.  
Partnerships, §4-46-101.

**Proprietor.**

Copyright collection practices, §4-76-102.

**Prospective purchaser.**

Telephonic sellers, §4-99-103.

**Provider.**

Motor vehicle service contracts, §4-90-502.  
Service contracts, §4-114-103.

**DEFINED TERMS —Cont'd****Provider fee.**

Service contracts, §4-114-103.

**Publicly post.**

Misappropriating social security numbers, §4-86-107.

**Purchase.**

Automobile dealers' anti-coercion, §4-75-402.

**Purchase price.**

Motor vehicle warranties, §4-90-403.

**Purchaser.**

Telephonic sellers, §4-99-103.

**Pyramiding devices.**

Deceptive trade practices, §4-88-109.

**Reasonable attempt to repair.**

Assistive device warranty, §4-105-201.

**Record.**

Limited partnerships, §4-47-102.  
Personal information protection act, §4-110-103.  
Pet stores, §4-97-103.

**Refund anticipation check,**  
§4-116-102.**Refund anticipation loan, §4-116-102.****Refund anticipation loan fee,**  
§4-116-102.**Registrant.**

Trademarks and labels, §4-71-201.

**Reimbursement insurance policy.**

Service contracts, §4-114-103.

**Reinstatement period.**

Rental purchases, §4-92-102.

**Relative.**

Fraudulent transfers, §4-59-201.

**Rental-purchase agreement,**  
§4-92-102.**Repair.**

Odometer regulations, §4-90-202.

**Repair facility.**

Aftermarket crash parts, §4-90-302.

**Repair or reconstruction services.**

Price gouging, §4-88-302.

**Replace.**

Odometer regulations, §4-90-202.

**Replacement motor vehicle.**

Motor vehicle warranties, §4-90-403.

**Reproduction.**

Fine prints sales, §4-73-301.

**Required information.**

Limited partnerships, §4-47-102.

**Restaurant franchise.**

Procedural fairness, §4-72-601.

**Retailer.**

Farm equipment retailer franchise protection, §4-72-301.  
Unfair cigarette sales, §4-75-702.  
Retail pet store, §4-97-103.

**DEFINED TERMS —Cont'd****Retail sale.**

Unfair cigarette sales, §4-75-702.

**Retail value.**

Prize promotion, §4-102-102.

**Royalties.**

Copyright collection practices,  
§4-76-102.

**Run.**

Motion pictures.

Unfair practices, §4-75-902.

**Sale.**

Unfair cigarette sales, §4-75-702.

**Sale, transfer or assignment.**

Franchises, §4-72-202.

**Salesperson.**

Telephonic seller, §4-99-103.

**Sales representative, §4-70-301.****School calendar.**

Advertisements on school calendars,  
§4-88-501.

**Second run.**

Motion pictures, §4-75-902.

**Secretary.**

Trademarks, §4-71-201.

**Security freeze.**

Credit report security freezes,  
§4-112-102.

**Security interest.**

Motor vehicle transfers, §4-100-101.

**Sell.**

Automobile dealers' anti-coercion,  
§4-75-402.

Unfair cigarette sales, §4-75-702.

**Sell at retail.**

Unfair cigarette sales, §4-75-702.

**Sell at wholesale.**

Unfair cigarette sales, §4-75-702.

**Seller.**

Health spa consumer protection,  
§4-94-102.

Home solicitation sales, §4-89-102.

Telephonic sellers, §4-99-103.

**Service.**

Deceptive trade practices, §4-88-102.

Home solicitation sales, §4-89-102.

Price gouging, §4-88-302.

**Service contract, §4-114-103.**

Motor vehicle service contracts,  
§4-90-502.

**Service contract holder, §4-114-103.**

Motor vehicle service contracts,  
§4-90-502.

**Service contracts, §4-90-502.**

Affiliate, §4-90-503.

**Service fee.**

Fair gift card act, §4-88-702.

**DEFINED TERMS —Cont'd****Service mark.**

Trademarks, §4-71-201.

**Sexually explicit electronic mail.**

Unsolicited commercial and sexually  
explicit electronic mail prevention  
act, §4-88-602.

**Sign.**

Limited partnerships, §4-47-102.

**Signed.**

Fine prints sales, §4-73-301.

**Slamming.**

Telecommunications industry,  
§4-88-401.

**Sold.**

Automobile dealers' anti-coercion,  
§4-75-402.

Quality specifications for engine fuels,  
petroleum products and  
automotive lubricants, §4-108-203.

**Solicitation.**

Deceptive trade practices, §4-88-102.

**Sponsor.**

Prize promotion, §4-102-102.

**State.**

Limited partnerships, §4-47-102.

Partnerships, §4-46-101.

**State agency.**

Personal information protection act,  
§4-110-103.

**Statement.**

Partnerships, §4-46-101.

**State of emergency.**

Price gouging, §4-88-302.

**Store gift card.**

Fair gift card act, §4-88-702.

**Subscriber.**

Slamming in telecommunications  
industry, §4-88-401.

**Subsequent runs.**

Motion pictures, §4-75-902.

**Substantially limits.**

Deceptive trade practices, §4-88-201.

**Surviving organization.**

Limited partnerships, conversion and  
merger, §4-47-1101.

Partnerships, conversions and  
mergers, §4-46-901.

**Telemarketer.**

Submitting for check or draft for  
payment, §4-99-203.

**Telephone solicitation.**

Caller identification blocking the  
telephonic sellers, §4-99-301.

**Telephonic seller, §4-99-103.****Theatre.**

Unfair practices, §4-75-902.

**DEFINED TERMS —Cont'd****Third party.**

Motor vehicle transfers, §4-100-101.

**Title.**

Odometer regulations, §4-90-202.

**Trademark, §4-71-201.****Trade name.**

Trademarks and labels, §4-71-201.

**Trade screening.**

Motion pictures.

Unfair practices, §4-75-902.

**Trade secret.**

Theft of, §4-75-601.

**Transaction account.**

Fair gift card act, §4-88-702.

**Transfer.**

Fraudulent transfers, §4-59-201.

Limited partnerships, §4-47-102.

Motor vehicle transfers, §4-100-101.

Odometer regulations, §4-90-202.

Partnerships, §4-46-101.

**Transferable interest.**

Limited partnerships, §4-47-102.

**Transferee.**

Limited partnerships, §4-47-102.

**Transportation, freight and storage services.**

Price gouging, §4-88-302.

**Unsolicted.**

Unsolicted commercial and sexually explicit electronic mail prevention act, §4-88-602.

**Use.**

Trademarks, §4-71-201.

**Valid lien.**

Fraudulent transfers, §4-59-201.

**Victim of identity theft.**

Credit report security freezes, §4-112-102.

**Warranty.**

Motor vehicle warranties, §4-90-403.

Service contracts, §4-114-103.

**Wholesale dealer and distributor.**

Automobile dealers' anti-coercion, §4-75-402.

**Wholesaler.**

Unfair cigarette sales, §4-75-702.

**Wholesale sales.**

Unfair cigarette sales, §4-75-702.

**DIAMONDS.****Sale of fracture-filled and clarity-enhanced diamonds.**

Duty of merchant, §4-101-201.

**DILUTION OF TRADEMARK,**

§4-71-213.

**DISABILITIES, INDIVIDUALS WITH.****Deceptive trade practices.**

Enhanced penalties for targeting individuals with disabilities.

Cause of action, §4-88-204.

Civil penalties, §4-88-202.

Determination, §4-88-203.

Definitions, §4-88-201.

Disposition of funds obtained from civil penalties, §4-88-202.

Education initiatives, §4-88-205.

Fund, §4-88-207.

Referrals for abuse, neglect and exploitation, §4-88-206.

**DISASTERS.**

Price gouging, §§4-88-301 to 4-88-305.

**DISCONTINUING BUSINESS SALES.**

General provisions, §§4-74-101 to 4-74-111.

**DISCOUNT CARDS.**

Health-related discount cards not insurance, §§4-106-201 to 4-106-205.

Action for violation, §4-106-202.

Cancellation of contract and full refund.

Buyer's right, time for exercising, §4-106-205.

Defendant required to testify an action for violation, §4-106-202.

Designation of agent for service of process, §4-106-203.

Eye or vision care services, provisions not applicable, §4-106-204.

Injunctions, §4-106-202.

Penalty, §4-106-202.

Prohibited practices, §4-106-201.

Registration of agent for service of process, §4-106-203.

Statute of limitations for actions for violations, §4-106-202.

Venue of action for violation, §4-106-202.

**DISCRIMINATION.****Consumer credit.**

Equal consumer credit act, §§4-87-101 to 4-87-105.

**DISSOLUTION.**

Limited partnerships, §§4-47-801 to 4-47-812.

Partnerships, §§4-46-801 to 4-46-807.

DOGGIE LEMON LAW, §4-97-105.

**DOGS.**

Lemon law, §4-97-105.

**DOGS —Cont'd**

**Retail pet stores**, §§4-97-101 to 4-97-109.

**Warranties on pets**, §4-97-105.

**DO NOT CALL LISTS**, §§4-99-401 to 4-99-408.

**DOOR TO DOOR SALES.**

**Home solicitation sales**, §§4-89-101 to 4-89-110.

**DRAFTS.**

**Telemarketers submitting for payment.**

Express consent of consumer required, §4-99-203.

**DRIVERS' LICENSES.****Numbers.**

Personal information protection act, §§4-110-101 to 4-110-108.

**E****ELECTRONIC FUNDS TRANSFERS.**

**Telemarketers submitting check for payment.**

Express consent of consumer required, §4-99-203.

**ELECTRONIC TRANSACTIONS.**

**Personal information protection act**, §§4-110-101 to 4-110-108.

**E-MAIL.**

**Spam e-mail**, §§4-88-601 to 4-88-607.

Authority of providers, §4-88-604.

Blocking receipt.

Authority of providers, §4-88-604.

Civil action.

Damages, costs and attorneys' fees, defense, §4-88-606.

Criminal penalty, §4-88-605.

Definitions, §4-88-602.

Enforcement of provisions, §4-88-607.

Notice by recipient not to send future communications, §4-88-603.

Preexisting business or personal relationship with recipient.

Commercial mail not unsolicited, §4-88-603.

Requirements for sending, §4-88-603.

Short title, §4-88-601.

**Unsolicited commercial and sexually explicit electronic mail prevention act**, §§4-88-601 to 4-88-607.

**EMERGENCIES.**

**Price gouging during emergencies or disasters**, §§4-88-301 to 4-88-305.

Definitions, §4-88-302.

Penalties, remedies and enforcement, §4-88-304.

Preemption, §4-88-305.

Prohibited practices, §4-88-303.

Taking unfair advantage of consumers, §4-88-301.

**ESTATES.****Statute of frauds.**

Assignment.

Compliance of statute required, §4-59-102.

Violation of statute.

Effect, §4-59-102.

**EVIDENCE.****Assumed names.**

Business under assumed name.

Certificate setting forth name.

Certified copy of certificate as presumptive evidence, §4-70-205.

**Cigarettes and tobacco products.**

Costs.

Sales at less than cost.

Advertisements, §4-75-708.

Unfair cigarette sales, §4-75-711.

**Consumer protection.**

Court order for production of evidence, §4-88-112.

Trade secrets.

Holding evidence in camera, §4-88-111.

**Monopolies and restraint of trade.**

Automobile dealer's anti-coercion act.

Exclusive financing agreements.

Threats as prima facie evidence, §4-75-409.

**EXECUTION OF JUDGMENTS.****Limited partnerships.**

General partners, execution of judgments against, §4-47-405.

**Partnerships.**

Against assets of partner, §4-46-307.

**EXECUTORS AND****ADMINISTRATORS.****Statute of frauds.**

Contracts charging representative personally, §4-59-101.

**EXPRESS WARRANTIES.**

**Assistive devices**, §§4-105-201 to 4-105-206.

**F**

**FACTORING CREDIT CARDS,**  
§§4-59-501 to 4-59-503.

**FAIR DISCLOSURE OF STATE  
FUNDED PAYMENTS FOR  
PHARMACISTS' SERVICES ACT,**  
§§4-88-801 to 4-88-804.

**FAIR GIFT CARD ACT,** §§4-88-701 to  
4-88-706.

**FARM MACHINERY.**

**Hour meters on farm machinery,**  
§§4-96-201, 4-96-202.  
Alteration prohibited, §4-96-201.  
Conspiracy to violate subchapter,  
§4-96-202.  
Penalties for violations, §4-96-202.  
Tampering prohibited, §4-96-201.

**FARMS AND FARMING.**

**Security interest in farm products.**  
Failure to disclose person with,  
§4-56-102.

**FEES.**

**Assumed names.**  
Business under assumed name.  
Certificate setting forth name.  
Fee of clerk for indexing and  
filing, §4-70-206.

**Credit card processing services.**  
Prohibitions, §4-115-101.

**Credit report security freezes.**  
Fees charged by agency, §4-112-108.

**Gift cards.**  
Unfair and deceptive acts and  
practices, §4-88-703.

**Going out of business sales.**  
Licenses.

Application for license, §4-74-106.

**Limited partnerships.**  
Filing fees, §§4-47-1301, 4-47-1302.

**Partnerships.**  
Filing fees generally, §4-46-1207.  
Secretary of state.

Documents delivered by electronic  
means, §4-42-708.

**Pets.**

Retail pet stores.  
Registration fee, §4-97-104.

**Service contracts.**  
Registration of providers, §4-114-104.  
**Trademarks,** §4-71-217.

**FICTITIOUS NAMES.**

**Partnerships, conducting business  
under common,** §4-42-707.

**FIDUCIARIES.**

**Limited partnerships.**

General partners, fiduciary duties,  
§4-47-408.

**Partnerships.**

Partners' fiduciary duties of loyalty  
and due care, §4-46-404.

**FINANCIAL TRANSACTION CARDS.**

**Factoring credit cards,** §§4-59-501 to  
4-59-503.

**Records of sale,** §§4-59-501 to  
4-59-503.

Definitions, §4-59-501.

**Felonies.**

Remission to acquirer not made by  
remitter, §4-59-502.

Solicitation not made by merchant  
to remit record of sale,  
§4-59-503.

**FINES.**

**Bills of lading.**

Duplicate bills not so marked,  
§4-59-303.

Issuing bill when goods not received,  
§4-59-305.

Negotiation when goods are not in  
carrier's possession, §4-59-307.

Nonnegotiable bill issuance not so  
marked, §4-59-304.

**Cigarettes and tobacco products.**

Sales at less than cost, §4-75-708.

**Commercial transactions.**

Principal and interest statements,  
§4-57-103.

**Credit card solicitation on college  
campus,** §4-104-204.

**Dairy products.**

Unlawful to limit quantity, §4-75-807.

**Motion pictures.**

Unfair practices, §4-75-903.

**Odometer violations,** §4-90-203.

**Prize promotion,** §4-102-103.

**Service contracts.**

Enforcement of provisions, §4-114-111.

**Unfair trade practices,** §4-75-204.

**Warehouse receipts.**

Issuance of duplicate receipt not so  
marked, §4-59-403.

Issuance when goods not received or  
controlled, §4-59-401.

**FIRE SALES.**

**Going out of business sales.**

General provisions, §§4-74-101 to  
4-74-111.

**FITNESS CENTERS.****Health spas.**

Consumer protection, §§4-94-101 to 4-94-109.

**FORCED OUT SALES.****Going out of business sales**

, generally, §§4-74-101 to 4-74-111.

**FORECLOSURES.****Partnerships.**

Transferable interest of partner.

Charging order, §4-46-504.

**FOREIGN CORPORATIONS.****Monopolies and restraint of trade.**

Automobile dealer's anti-coercion act.

Prohibition on doing business upon violation of subchapter, §4-75-406.

**FOREIGN LIMITED LIABILITY**

**PARTNERSHIPS**, §§4-46-1101 to 4-46-1105.

**FOREIGN LIMITED**

**PARTNERSHIPS**, §§4-47-901 to 4-47-908.

**FORFEITURES.****Monopolies and restraint of trade.**

Automobile dealer's anti-coercion act.

Charter rights may be forfeited for violation of provisions, §4-75-405.

**FORGERY AND COUNTERFEITING.****Assignments.**

Nonnegotiable instruments.

Proof of assignment not required except on allegation of forgery, §4-58-109.

**FORMS.****Going out of business sales.**

Licenses, §4-74-109.

**FORUM SELECTION CLAUSES.****Motor vehicle sales contracts,**

§4-75-413.

**FRANCHISES.****Actions.**

Misleading and fraudulent schemes.

Violation of provisions.

Prosecutions.

Statute of limitations, §4-72-207.

Petroleum products franchises.

Dealer-supplier or distributor franchises.

Cancellation, termination or refusal to renew, §4-72-503.

**FRANCHISES —Cont'd****Actions —Cont'd**

Petroleum products franchises

—Cont'd

Supplier-distributor franchises.

Cancellation, termination or refusal to renew, §4-72-403.

**Advertising.**

Unlawful practices of franchisors, §4-72-206.

**Agriculture.**

Farm equipment.

Retailer franchise protection, §§4-72-301 to 4-72-311.

**Applicability of subchapter,**

§4-72-203.

**Arkansas franchise practices act.**

Applicability of subchapter, §4-72-203.

Citation of chapter, §4-72-201.

Title of chapter, §4-72-201.

**Assignments.**

Definition of assignments, §4-72-202.

Notice, §4-72-205.

Requirements, §4-72-205.

**Attorney general.**

Injunctions.

Authority to seek, §4-72-208.

**Attorneys' fees.**

Remedies of franchisees, §4-72-208.

**Cancellation.**

Good cause.

Violation to cancel franchise without good cause, §4-72-204.

Notice, §4-72-204.

Petroleum products franchises.

Dealer-supplier or distributor franchises, §4-72-502.

Remedies for cancellation, §4-72-503.

Supplier-distributor franchises, §4-72-402.

Remedies, §4-72-403.

Requirements, §4-72-204.

**Construction and interpretation.**

Applicability of subchapter, §4-72-203.

Farm equipment retailer franchise protection.

Applicability of subchapter, §4-72-302.

Bulk sales law inapplicable, §4-72-303.

Cumulative nature of subchapter, §4-72-302.

Security interests unaffected by subchapter, §4-72-303.

**FRANCHISES —Cont'd****Death.**

Farm equipment retailer franchise protection.

Death of retailer equivalent to termination, §4-72-306.

**Definitions.**

Arkansas franchise practices act, §4-72-202.

Farm equipment retailer franchise protection, §4-72-301.

Franchise practices act, §4-72-201.

Petroleum products franchises.

Dealer-supplier or distributor franchises, §4-72-501.

Supplier-distributor franchises, §4-72-401.

**Farm equipment retailer franchise protection.**

Applicability of subchapter, §4-72-302.

Bulk sales.

Inapplicability of bulk sales law, §4-72-303.

Cost.

Net cost.

Defined, §4-72-301.

Cumulative nature of subchapter, §4-72-302.

Current models.

Defined, §4-72-301.

Death of retailer.

Equivalent to termination, §4-72-306.

Exceptions to provisions, §4-72-307.

Inventory.

Defined, §4-72-301.

Option of retailer at termination of franchise, §4-72-305.

Repurchase by wholesaler, manufacturer or distributor, §§4-72-304, 4-72-305.

Death of retailer, §4-72-306.

Exceptions, §4-72-307.

Liability for failure to repurchase, §4-72-309.

Title and possession of inventory, §4-72-308.

Price.

Current net price.

Defined, §4-72-301.

Prohibited acts, §4-72-310.

Repurchase of inventory by wholesaler, manufacturer or distributor, §§4-72-304, 4-72-305.

Retailers.

Defined, §4-72-301.

Security interests.

Unaffected by subchapter, §4-72-303.

**FRANCHISES —Cont'd****Farm equipment retailer franchise protection —Cont'd**

Termination of franchise.

Death of retailer equivalent to termination, §4-72-306.

Repurchase of inventory by wholesaler, manufacturer or distributor, §§4-72-304, 4-72-305.

Retailer to have option on merchandise, §4-72-305.

Violations, §4-72-310.

Warranties, §4-72-311.

**Franchisees.**

Defined, §4-72-202.

Remedies, §4-72-208.

**Franchise practices act.**

Applicability of subchapter, §4-72-203.

Citation of chapter, §4-72-201.

Title of chapter, §4-72-201.

**Franchisers.**

Defined, §4-72-202.

Prohibited acts, §4-72-204.

Termination, cancellation or failure to renew, §4-72-204.

Transfer, assignment or sale of franchise, §4-72-205.

Unlawful practices of franchisers.

Enumerated, §4-72-206.

**Fraud.**

Franchisee's remedies, §4-72-207.

Misleading and fraudulent schemes, §4-72-207.

Violation of provisions.

Penalties, §4-72-207.

Penalties, §4-72-207.

**Good cause.**

Cancellation.

Violation to cancel franchise without good cause, §4-72-204.

Change in management of franchisee.

Franchisor may not seek absent good cause, §4-72-206.

Defined, §4-72-202.

Renewal.

Failure to renew.

Violation to fail to renew absent good cause, §4-72-204.

Termination.

Right of repurchase of franchisee, §4-72-209.

Violation to terminate or cancel franchise without good cause, §4-72-204.

**Good faith.**

Defined, §4-72-202.

**FRANCHISES —Cont'd****Good faith —Cont'd**

Franchisor's dealings with franchisee,  
§4-72-206.

**Immunity.**

Granting immunity to those furnishing  
information to and for subchapter,  
§4-72-210.

**Injunctions.**

Attorney general.

Authority to seek, §4-72-208.

Franchisee's remedies, §4-72-208.

Petroleum products franchises.

Dealer-supplier or distributor  
franchises.

Cancellation, termination or  
refusal to renew, §4-72-503.

Supplier-distributor franchises.

Cancellation, termination or  
refusal to renew, §4-72-403.

**Inventory.**

Farm equipment retailer franchise  
protection.

Definition of inventory, §4-72-301.

Option of retailer on merchandise at  
termination of franchise,  
§4-72-305.

Repurchase by wholesaler,  
manufacturer or distributor,  
§4-72-304.

Exceptions to provisions,  
§4-72-307.

Liability for failure to repurchase,  
§4-72-309.

Title and possession of inventory,  
§4-72-308.

**Liability.**

Exculpation.

Franchiser not to require, §4-72-206.

Farm equipment retailer franchise  
protection.

Inventory.

Repurchase by wholesaler,  
manufacturer or distributor.

Failure to repurchase,  
§4-72-309.

Immunity granted furnishing those  
information to enforce subchapter,  
§4-72-210.

**Limitation of actions.**

Petroleum products franchises.

Dealer-supplier or distributor  
franchises.

Cancellation, termination or  
refusal to renew, §4-72-503.

Supplier-distributor franchises.

Cancellation, termination or  
refusal to renew, §4-72-403.

**FRANCHISES —Cont'd****Misrepresentation.**

Misleading and fraudulent schemes.

Violation of provisions.

Penalties, §4-72-207.

**Notice.**

Petroleum products franchises.

Dealer-supplier or distributor  
franchises.

Cancellation, termination or  
refusal to renew, §4-72-502.

Supplier-distributor franchises.

Cancellation, termination or  
refusal to renew franchise,  
§4-72-402.

Termination, cancellation or failure to  
renew.

Generally, §4-72-204.

Transfer, assignment or sale of  
franchise, §4-72-205.

**Penalties.**

Fraud, §4-72-207.

**Persons.**

Defined, §4-72-202.

**Petroleum products franchises.**

Dealer-supplier or distributor  
franchises.

Actions.

Cancellation, termination or  
refusal to renew franchise,  
§4-72-503.

Cancellation of franchise, §4-72-502.

Remedies, §4-72-503.

Definitions, §4-72-501.

"Franchises" defined, §4-72-501.

Injunctions.

Cancellation, termination or  
refusal to renew franchise,  
§4-72-503.

Limitation of actions.

Cancellation, termination or  
refusal to renew franchise,  
§4-72-503.

Notice.

Cancellation or termination of  
franchise, §4-72-502.

Petroleum products dealers.

Defined, §4-72-501.

Petroleum products distributors.

Defined, §4-72-501.

Petroleum products suppliers.

Defined, §4-72-501.

Remedies for cancellation or  
termination of franchise,  
§4-72-503.

Renewal.

Failure to renew franchise,  
§4-72-502.

Remedies, §4-72-503.

**FRANCHISES —Cont'd****Petroleum products franchises****—Cont'd**

Dealer-supplier or distributor franchises —Cont'd

Specific performance.

Cancellation, termination or refusal to renew franchise, §4-72-503.

Termination of franchise, §4-72-502.

Remedies, §4-72-503.

Supplier-distributor franchise agreements.

Actions.

Cancellation, termination or refusal to renew franchise, §4-72-403.

Cancellation of franchise, §4-72-402.

Remedies, §4-72-403.

Definitions, §4-72-401.

"Franchises" defined, §4-72-401.

Injunctions.

Cancellation, termination or refusal to renew franchise, §4-72-403.

Limitation of actions.

Cancellation, termination or refusal to renew franchise, §4-72-403.

Notice.

Cancellation or termination of franchise, §4-72-402.

Petroleum products distributor.

Defined, §4-72-401.

Petroleum products supplier.

Defined, §4-72-401.

Remedies.

Cancellation, termination, etc., of franchise, §4-72-403.

Renewal.

Failure to renew, §4-72-402.

Specific performance.

Cancellation, termination or refusal to renew franchise, §4-72-403.

Termination of franchise, §4-72-402.

Remedies, §4-72-403.

**Place of business.**

Defined, §4-72-202.

**Price.**

Farm equipment retailer franchise protection.

Current net price.

Defined, §4-72-301.

**Remedies.**

Franchisee's remedies, §4-72-208.

Misleading and fraudulent schemes.

Violation of provisions.

Recovery available, §4-72-208.

**FRANCHISES —Cont'd****Remedies —Cont'd**

Petroleum products franchises.

Dealer-supplier or distributor franchises.

Cancellation, termination or refusal to renew, §4-72-503.

Supplier-distributor franchises.

Cancellation, termination or refusal to renew, §4-72-403.

**Renewal.**

Failure to renew.

Good faith required, §4-72-204.

Notice, §4-72-204.

Requirements, §4-72-204.

Good cause.

Failure to renew.

Violation to fail to renew absent good cause, §4-72-204.

Refusal to renew.

Petroleum products franchises.

Dealer-supplier or distributor franchises, §4-72-502.

Remedies, §4-72-503.

Supplier-distributor franchises, §4-72-402.

Remedies, §4-72-403.

**Repurchase.**

Franchisee's right of repurchase.

Termination without good cause triggering right of repurchase, §4-72-209.

**Restaurants.**

Procedural fairness.

Applicability of provisions, §4-72-603.

Commencement of civil action or arbitration proceeding, §4-72-602.

Definitions, §4-72-601.

**Sales.**

Definition of sale, §4-72-202.

Notice, §4-72-205.

Requirements, §4-72-205.

**Securities.**

Restrictions imposed by franchisor.

Unlawful practices, §4-72-206.

**Specific performance.**

Petroleum products franchises.

Dealer-supplier or distributor franchises.

Cancellation, termination or refusal to renew, §4-72-503.

Supplier-distributor franchises.

Cancellation, termination or refusal to renew, §4-72-403.

**FRANCHISES —Cont'd****Termination.**

Good cause.

Right of repurchase of franchisee,  
§4-72-209.

Violation to terminate or cancel  
franchise without good cause,  
§4-72-204.

Notice, §4-72-204.

Petroleum products franchises.

Dealer-supplier or distributor  
franchises, §4-72-502.

Remedies, §4-72-503.

Supplier-distributor franchises,  
§4-72-402.

Remedies, §4-72-403.

Requirements, §4-72-204.

**Transfers.**

Defined, §4-72-202.

Notice, §4-72-205.

Requirements, §4-72-205.

**Treble damages.**

Franchisee's remedies, §4-72-208.

**Unlawful practices.**

Enumerated, §4-72-206.

Violation of chapter, §4-72-206.

**FRAUD.****Consumer protection.**

Deceptive trade practices, §4-88-107.

Concealment, suppression or  
omission of material facts,  
§4-88-108.

**Conveyances.**

Fraudulent conveyances, §§4-59-201 to  
4-59-213.

**Financial transaction cards.**

Remission to acquirer of record of sale  
not made by remitter, §4-59-502.

Solicitation of merchant to remit  
record of sale not made by the  
merchant, §4-59-503.

**Franchises.**

Misleading and fraudulent schemes,  
§4-72-207.

**Going out of business sales,**

§4-74-111.

**Liquidation sales.**

Going out of business sales, §4-74-111.

**Odometer tampering.**

Right of action, §4-90-207.

**Statute of frauds,** §§4-59-101 to  
4-59-103.

**Trademarks.**

Fraudulent registration, §4-71-211.

**Warehouse receipts.**

Issuance of receipts containing false  
statement.

Penalty, §4-59-402.

**FRAUDULENT TRANSFERS.****Actions.**

Extinguishment of cause of action,  
§4-59-209.

**Citation of subchapter,** §4-59-212.

**Construction and interpretation.**

Uniformity of application and  
construction, §4-59-211.

**Creditors.**

Present and future creditors.

Transfers fraudulent as to,  
§§4-59-204, 4-59-205.

Remedies, §4-59-207.

**Defenses.**

Transferee, §4-59-208.

**Definitions,** §4-59-201.

Insolvency, §4-59-202.

Value, §4-59-203.

**Insolvency.**

Defined, §4-59-202.

**Liability.**

Protection of transferee, §4-59-208.

**Limitation of actions,** §4-59-209.**Remedies.**

Creditors, §4-59-207.

**Repeal of acts,** §4-59-213.**Supplementary provisions,** §4-59-210.**Title of subchapter,** §4-59-212.**Value.**

General provisions, §4-59-203.

**When made or obligation incurred,**  
§4-59-206.

**FUEL.**

**Quality specifications for engine  
fuels, petroleum products and  
automotive lubricants,**  
§§4-108-201 to 4-108-213.

**G****GIFT CARDS.**

**Fair gift card act,** §§4-88-701 to  
4-88-706.

Definitions, §4-88-702.

Disclosures required, §4-88-703.

Enforcement of provisions, §4-88-705.

Inapplicability of provisions,  
§4-88-704.

Rules promulgation, §4-88-706.

Title of provisions, §4-88-701.

Unfair and deceptive acts and  
practices, §4-88-703.

**GIFTS.****Consumer protection.**

Unsolicited merchandise, §4-86-103.

**Fair gift card act,** §§4-88-701 to  
4-88-706.

**GOING OUT OF BUSINESS SALES.****Advertisements.**

Licenses.

Required, §4-74-105.

**Bonds, surety.**

Licenses.

Application for license.

Application to be accompanied by  
bond, §4-74-107.**Construction and interpretation.**Sales excepted from chapter,  
§4-74-103.**Continuation of business after sale.**

Seller may not continue, §4-74-110.

**Definitions, §4-74-101.****Enforcement of chapter, §4-74-104.****Exemptions from act, §4-74-103.****False representations, §4-74-111.****Fees.**

Licenses.

Application for license, §4-74-106.

**Forms.**

Licenses, §4-74-109.

**Licenses.**

Application for license, §4-74-106.

Bonds, surety, §4-74-107.

Fee, §4-74-106.

Forms, §4-74-109.

Preserving applications, §4-74-109.

Display of license, §4-74-108.

Duration, §4-74-109.

Extension, §4-74-108.

Forms, §4-74-109.

Required, §4-74-105.

Term, §4-74-108.

Extension, §4-74-108.

**Misrepresentation, §4-74-111.****Orders.**Sales under order of court excepted  
from chapter, §4-74-103.**Penalties, §4-74-102.****Persons.**

Defined, §4-74-101.

**Prosecuting attorneys.**

Enforcement of chapter, §4-74-104.

**Seller may not continue business  
after sale, §4-74-110.****Sheriffs.**

Enforcement of chapter, §4-74-104.

**Violations of provisions.**

Misdemeanor, §4-74-102.

**GOOD FAITH.****Assignments of nonnegotiable  
instruments, §4-58-105.****Limited partners.**

Duties, §4-47-305.

Person erroneously believing self as  
limited partner, §4-47-306.**GRAIN.****Security interest in farm products.**Failure to disclose person with,  
§4-56-102.**GRAVESTONES.****Veterans.**

Inscription, §4-86-105.

**H****HACKING.****Consumer protection against  
computer spyware act,**

§§4-111-101 to 4-111-105.

**HEALTH-RELATED DISCOUNT****CARDS NOT INSURANCE,**

§§4-106-201 to 4-106-205.

**Action for violation, §4-106-202.****Cancellation of contract and full  
refund.**Buyer's right, time for exercising,  
§4-106-205.**Defendant required to testify an  
action for violation, §4-106-202.****Designation of agent for service of  
process, §4-106-203.****Eye or vision care services,  
provisions not applicable,**  
§4-106-204.**Injunctions, §4-106-202.****Penalty, §4-106-202.****Prohibited practices, §4-106-201.****Registration of agent for service of  
process, §4-106-203.****Statute of limitations for actions for  
violations, §4-106-202.****Venue of action for violation,**  
§4-106-202.**HEALTH SPAS.****Consumer protection, §§4-94-101 to  
4-94-109.****Buyers.**

Defined, §4-94-102.

Citation of chapter, §4-94-101.

Construction and interpretation.

Scope of chapter, §4-94-103.

Contracts for health spa services.

Buyer financing.

Payment period.

Limitation, §4-94-107.

Cancellation, §4-94-109.

Refund of money, §4-94-109.

Defined, §4-94-102.

Delivery to buyer, §4-94-104.

Notice.

Cancellation of contract,  
§4-94-109.

**HEALTH SPAS —Cont'd****Consumer protection —Cont'd**

Contracts for health spa services  
—Cont'd

Payment period, §4-94-107.

Time for performance, §4-94-108.

Void or voidable provisions,  
§4-94-105.

Planned spa facilities or spa  
facilities under construction.

Limitation on time of  
availability of services,  
§4-94-108.

Waiver of provisions of chapter.

Unenforceable, §4-94-105.

Writing required, §4-94-104.

Definitions, §§4-94-101, 4-94-102.

**Notice.**

Contracts for health spa services.

Cancellation of contracts,  
§4-94-109.

**Refunds.**

Cancellation of contracts for health  
spa services, §4-94-109.

Registration statement, §4-94-106.

Scope of chapter, §4-94-103.

**Sellers.**

Defined, §4-94-102.

Title of chapter, §4-94-101.

Waiver of provisions of chapter.

Unenforceable, §4-94-105.

**Registration, §4-94-106.****HEIRS.****Franchises.**

Farm equipment.

Retailer's death, §4-72-306.

Franchisor restrictions, §4-72-206.

**HOME SECURITY SERVICES.**

**Automatic renewal of contracts,**  
§4-86-106.

**HOME SOLICITATION SALES.****Actions.**

Civil actions against violators,  
§4-89-106.

**Appropriate trade premises.**

Defined, §4-89-102.

**Attorney general.**

Enforcement of provisions, §4-89-106.

**Cancellation of offer or contract.**

Care of goods in possession of buyer.

Duty of buyer, §4-89-110.

**Notice.**

Effect, §4-89-107.

Form, §4-89-108.

Required, §4-89-108.

Return of goods, §§4-89-109, 4-89-110.

**HOME SOLICITATION SALES**

—Cont'd

**Cancellation of offer or contract**

—Cont'd

Return of payments, §4-89-109.

Right of buyer, §4-89-107.

**Contracts.**

Excepted contracts, §4-89-103.

**Damages.**

Violations of provisions, §4-89-105.

**Deceptive trade practices.**

Defined, §4-89-102.

**Definitions, §4-89-102.****Exceptions to provisions.**

Contracts, §4-89-103.

**Goods.**

Defined, §4-89-102.

**Legislative declaration.**

Purpose of act, §4-89-101.

**Mail and telephone solicitation sales.**

General provisions, §§4-95-101 to  
4-95-108.

**Notice.**

Cancellation of offer or contract.

Effect, §4-89-107.

Form, §4-89-108.

Required, §4-89-108.

**Penalties.**

Violations of provisions, §4-89-104.

**Prize promotion, §§4-102-101 to  
4-102-109.****Prosecuting attorneys.**

Enforcement of provisions, §4-89-106.

**Purpose of act, §4-89-101.****Sellers.**

Defined, §4-89-102.

**Services.**

Defined, §4-89-102.

**Telephone solicitation sales.**

General provisions, §§4-95-101 to  
4-95-108.

**Violations of provisions.**

Damages, §4-89-105.

Penalties, §4-89-104.

**HUMANE SOCIETIES.****Retail pet stores.**

General provisions, §§4-97-101 to  
4-97-109.

**I****IDENTIFICATION CARDS.**

**Personal information protection act,**  
§§4-110-101 to 4-110-108.

**IDENTITY THEFT.**

**Credit report security freezes,**  
§§4-112-101 to 4-112-114.

**IDENTITY THEFT —Cont'd**

**Personal information protection**  
generally, §§4-110-101 to  
4-110-108.

**IMMIGRATION.****Notario or notario publico.**

Notary advertising services as.  
Not authorized to assist in  
immigration matters.  
Disclosure required, §4-109-103.

**IMMUNITY.****Consumer protection.**

Product liability, §4-86-102.  
Warranties.  
Breach of warranty, §4-86-101.

**Franchises.**

Exculpation.  
Franchiser not to require, §4-72-206.  
Farm equipment retailer franchise  
protection.  
Inventory.  
Repurchase by wholesaler,  
manufacturer or distributor.  
Failure to repurchase,  
§4-72-309.

Granting immunity to those furnishing  
information to and for subchapter,  
§4-72-210.

Immunity granted those furnishing  
information to enforce subchapter,  
§4-72-210.

**INCOME TAX.****Loans.**

Refund anticipation loans, §§4-116-101  
to 4-116-108.

**Refunds.**

Refund anticipation loans, §§4-116-101  
to 4-116-108.

**INDEMNIFICATION.****Partnerships.**

Indemnification of partners, §4-46-401.

**INFORMATION BROKERS.**

**Personal information protection act,**  
§§4-110-101 to 4-110-108.

**INFORMATION SYSTEMS.**

**Personal information protection act,**  
§§4-110-101 to 4-110-108.

**Spyware.**

Consumer protection against computer  
spyware act, §§4-111-101 to  
4-111-105.

**INFRINGEMENT.**

**Trademarks,** §4-71-212.

**INJUNCTIONS.****Cigarettes and tobacco products.**

Unfair cigarette sales.  
Violations or provisions, §4-75-713.

**Consumer protection.**

Powers of courts, §4-88-112.  
Unlawful practices, §4-88-104.

**Copyright collection practices,**  
§4-76-107.

**Franchises.**

Attorney general.  
Authority to seek, §4-72-208.  
Franchisee's remedies, §4-72-208.  
Petroleum products franchises.  
Dealer-supplier or distributor  
franchises.  
Cancellation, termination or  
refusal to renew, §4-72-503.  
Supplier-distributor franchises.  
Cancellation, termination or  
refusal to renew, §4-72-403.

**Health-related discount cards not  
insurance,** §4-106-202.

**Limited partnerships.**

Foreign limited partnerships.  
Action to restrain transacting of  
business, §4-47-908.

**Mail and telephone solicitation  
sales.**

Unlawful practices, §4-95-104.

**Milk and milk products.**

Unfair trade practices.  
Violations of provisions, §4-75-809.

**Monopolies and restraint of trade.**

Actions by attorney general, §4-75-315.  
Unfair practices, §4-75-212.  
Violations of provisions, §4-75-211.

**Motion pictures.**

Fair practices.  
Violations of provisions, §4-75-904.

**Oil and gas.**

Quality specifications for engine fuels,  
petroleum products and  
automotive lubricants, §4-108-210.

**Service contracts.**

Enforcement of provisions, §4-114-111.

**Social security numbers.**

Misappropriation, prohibited acts,  
§4-86-107.

**Trade secrets.**

Misappropriation, §4-75-604.

**INSURANCE.****Commissioner of insurance.**

Service contracts.  
Enforcement of provisions,  
§4-114-111.  
Rules promulgation, §4-114-112.

**INSURANCE —Cont'd****Service contracts.**

- Enforcement of provisions, §4-114-111.
- Provider insurance requirements, §4-114-104.
- Reimbursement insurance policies.
  - Cancellation, §4-114-109.
  - Disclosures, §4-114-105.
  - Obligations of insurers, §4-114-110.
- Rules promulgation, §4-114-112.

**INSURANCE COMPANIES.****Foreign insurance companies.**

- Automobile dealer's anti-coercion act.
- Prohibition on doing business upon violation of subchapter, §4-75-406.

**INTEREST.****Actions, §4-57-108.**

- Usurious contracts.
- Attorneys at law.
  - Fees in litigation involving usurious transactions, §4-57-108.

**Attorneys at law.**

- Fees.
- Litigation involving usurious transaction, §4-57-108.

**Calculating interest.**

- Annual computation when computation period not stated, §4-57-101.
- Month, §4-57-101.
- Part of month, §4-57-101.
- Partial payment, §4-57-101.

**Carriers.**

- Freight and parcel delivery services.
- Interest on deposits, §4-86-104.

**Contracts.**

- Maximum rate of interest by contract, §4-57-104.

**Discounting.**

- Period, §4-57-102.

**Limited partnerships.**

- Interest rates, §4-47-107.

**Partial payment.**

- Calculating interest, §4-57-101.

**Partnerships.**

- Rate if not specified in obligation, §4-46-104.

**Penalties.**

- Statement of principal and interest.
- Refusal to furnish or furnishing false statement, §4-57-103.

**Prejudgment interest, §4-57-104.****Railroads.**

- Freight and parcel delivery services.
- Interest on deposits, §4-86-104.

**INTEREST —Cont'd****Rates of interest.**

- Freight and parcel delivery services, §4-86-104.

- Maximum rates, §4-57-104.

- Exceeding maximum rates prohibited, §4-57-105.

**Usury.**

- Prohibited, §4-57-105.

**Reserved or discounted for thirty-six months.**

- Authorized, §4-57-102.

**Statement of principal and interest.**

- Lender required to furnish to debtor, §4-57-103.

- Refusal to furnish or furnishing false statement.

- Penalties, §4-57-103.

**Usury.**

- Prohibited, §4-57-105.

**INTERNET.****Connect Arkansas broadband program, §§4-113-101 to 4-113-106.****Consumer protection against computer spyware act, §§4-111-101 to 4-111-105.****Ticket sales, restrictions, §4-70-103.****Unsolicited commercial and sexually explicit electronic mail prevention act, §§4-88-601 to 4-88-607.**

- Authority of providers, §4-88-604.

- Blocking receipt.

- Authority of providers, §4-88-604.

- Civil actions, §4-88-606.

- Criminal penalty, §4-88-605.

- Definitions, §4-88-602.

- Enforcement of provisions, §4-88-607.

- Notice by recipient not to send future communications, §4-88-603.

- Preexisting business or personal relationship with recipient.

- Commercial mail not unsolicited, §4-88-603.

- Requirements for sending, §4-88-603.

- Short title, §4-88-601.

**INTERPLEADER AND INTERVENTION.****Limited partnerships.**

- General partners.

- Actions for improper distributions, impleading of others, §4-47-509.

**INVENTORY.****Franchises.**

- Farm equipment retailer franchise protection.

- Definition of inventory, §4-72-301.

**INVENTORY —Cont'd****Franchises —Cont'd**

- Farm equipment retailer franchise protection —Cont'd
- Option of retailer on merchandise at termination of franchise, §4-72-305.
- Repurchase by wholesaler, manufacturer or distributor, §4-72-304.
- Exceptions to provisions, §4-72-307.
- Liability for failure to repurchase, §4-72-309.
- Title and possession of inventory, §4-72-308.

**INVESTIGATIONS.****Consumer protection.**

- Deceptive trade practices, §4-88-111.
- Failure to cooperate in investigations, §4-88-112.
- Powers and duties of consumer protection division, §4-88-105.

**Motor vehicles.**

- Service contracts, §4-90-509.

**J****JEWELERS.**

- Sale of fracture-filled and clarity-enhanced diamonds, §4-101-201.

**JOINDER OF ACTIONS.****Monopolies and restraint of trade.**

- Discrimination.
- Price of manufactured products, coal oil or dressed beef.
- Actions for recovery of forfeitures.
- Joinder of offenses, §4-75-501.

**JUDGMENTS AND DECREES.****Limited partnerships.**

- General partners, execution of judgments against, §4-47-405.

**Partnerships.**

- Against partnerships, §4-46-307.
- Transferable interest of partner.
- Charging order, subject to, §4-46-504.

**JUNK E-MAIL, §§4-88-601 to 4-88-607.****JURISDICTION.****Consumer credit.**

- Equal consumer credit act.
- Actions for violations, §4-87-102.

**JURISDICTION —Cont'd****Limited partnerships.**

- Conversion and merger.
- Foreign organization that is converted.
- Consent to jurisdiction, §4-47-1105.
- Foreign organization that is survivor of merger.
- Consent to jurisdiction, §4-47-1109.

**Sales representatives.**

- Jurisdiction over principal, §4-70-304.

**K****KITTY LEMON LAW, §4-97-105.****L****LABELS.**

- Charitable solicitation containers, §§4-103-201 to 4-103-205.

**LANDLORD AND TENANT.****Statute of frauds.**

- Leases, estates, etc., §4-59-102.

**LAW ENFORCEMENT AGENCIES.**

- Tobacco control board, §4-75-714.

**LEASES.****Motor vehicles.**

- Prohibited transfers, §4-100-103.
- Definitions, §4-100-101.
- Penalties, §4-100-102.
- Remedies, §4-100-102.

**Statute of frauds.**

- Assignment.
- Compliance of statute required, §4-59-102.
- Violation of statute.
- Effect, §4-59-102.
- Writing required, §4-59-101.

**LEMON LAW, §§4-90-401 to 4-90-417.****Actions.**

- Consumer's right to bring civil action to enforce provisions, §4-90-415.

**Arbitration.**

- Informal dispute resolution, §4-90-414.

**Assistive devices, §§4-105-201 to 4-105-206.****Assistive device warranty, §§4-105-201 to 4-105-206.****Attorneys' fees.**

- Enforcement of provisions, §4-90-415.

**LEMON LAW —Cont'd****Citation of subchapter, §4-90-401.****Claims.**

Noticed by consumer, §4-90-404.

**Costs, §4-90-415.****Deceptive trade practices.**

Violations of provisions, §4-90-417.

**Defenses.**

Affirmative defenses, §4-90-413.

**Definitions, §4-90-403.****Diagnosis.**

Refusal to make, §4-90-411.

**Disclosure by manufacturer, agent or dealer, §4-90-404.****Enforcement of provisions, §4-90-415.****Informal dispute resolution, §4-90-414.****Intent of legislature, §4-90-402.****Legislative determinations and intent, §4-90-402.****Limitation of actions, §4-90-416.****Notice of claim by consumer, §4-90-404.****Option to retain use of vehicle, §4-90-409.****Pet lemon law, §4-97-105.****Presumption.**

Reasonable attempts to repair, §4-90-410.

**Refunds, §4-90-407.****Rental car.**

Reimbursement, §4-90-408.

**Repairs.**

Documentation, §4-90-411.

Extension of time to repair.

War, invasion, strike, etc., §4-90-410.

Presumption of reasonable attempts to repair, §4-90-410.

Refusal to make, §4-90-411.

Required warranty repairs, §4-90-405.

Failure to make, §4-90-406.

**Retention of use of vehicle.**

Option by consumer, §4-90-409.

**Sales.**

Resale of returned nonconforming vehicle, §4-90-412.

**Title of subchapter, §4-90-401.****Towing cost.**

Reimbursement, §4-90-408.

**LICENSES AND PERMITS.****Cigarettes and tobacco products.**

Sales, §4-75-707.

**LIENS.****Art.**

Consignment act.

Exemption from liens.

Works of art consigned for sale, §4-73-206.

**LIENS —Cont'd****Assignments.**

Nonnegotiable instruments.

Vendor's lien inures to benefit of assignee, §4-58-107.

**Bills of lading.**

Negotiation of bill for goods upon which there is lien or mortgage.

Penalty, §4-59-306.

**Limited partnerships.**

Transferable interests.

Creditor's rights, §4-47-703.

**Partnerships.**

Limited partnerships.

Transferable interests.

Creditor's rights, §4-47-703.

Transferable interest of partner.

Charging order constitutes, §4-46-504.

**Warehouse receipts.**

Negotiation of receipts by depositor of encumbered goods without disclosing facts.

Penalty, §4-59-406.

**LIMITATION OF ACTIONS.****Consumer protection, §4-88-115.****Franchises.**

Petroleum products franchises.

Dealer-supplier or distributor franchises.

Cancellation, termination or refusal to renew, §4-72-503.

Supplier-distributor franchises.

Cancellation, termination or refusal to renew, §4-72-403.

**Fraudulent conveyances, §4-59-209.****Health-related discount cards not insurance.**

Action for violation, §4-106-202.

**Lemon law, §4-90-416.****Limited partnerships.**

Dissolution, claims not known at time of, §4-47-807.

Improper distributions, §4-47-509.

**Monopolies and restraint of trade.**

Actions by attorney general, §4-75-320.

Unfair practices.

Actions by attorney general, §4-75-217.

**Odometer tampering, §4-90-207.****Pay per call.**

Consumer actions, §4-98-105.

**Trade secrets.**

Misappropriation, §4-75-603.

**LIMITED LIABILITY**

**PARTNERSHIPS**, §§4-46-1001 to 4-46-1105.

**Annual report.**

Required, filing, §4-46-1003.

**Authority to become limited liability partnership**, §4-46-1001.**Continues as same entity as existed before filing**, §4-46-201.**Foreign limited liability partnerships**, §§4-46-1101 to 4-46-1105.

Action by attorney general, §4-46-1105.

Activities not constituting transacting business, §4-46-1104.

Failure to qualify, effect, §4-46-1103.

Governing law, §4-46-1101.

Relations among partners.

Governing law, §4-46-1101.

Statement of qualification, §4-46-1102.

Failure to qualify, effect, §4-46-1103.

Transacting business.

Activities not constituting, §4-46-1104.

**Name.**

Requirements, §4-46-1002.

**Notice.**

Intent to revoke statement of qualification.

Failure to file annual report, §4-46-1003.

**Obligation incurred.**

Solely obligation of partnership, §4-46-306.

**Reports.**

Annual report.

Required, filing, §4-46-1003.

**Statement of qualification**, §4-46-1001.

Foreign limited liability partnerships, §4-46-1102.

Failure to qualify, effect, §4-46-1103.

Revocation.

Failure to file annual report, §4-46-1003.

**Terms and conditions of partnership.**

Vote of partners required to approve, §4-46-1001.

**Time.**

Annual report.

Filing, §4-46-1003.

**LIMITED PARTNERSHIPS**, §§4-47-101 to 4-47-1302.**Actions.**

Derivative actions, §§4-47-1002 to 4-47-1005.

**LIMITED PARTNERSHIPS —Cont'd****Actions —Cont'd**

Direct action by partner, §4-47-1001.

General partners.

Effect of actions by and against partnership and partners, §4-47-405.

Liability for consent to improper distributions, §4-47-509.

**Agents.**

General partners.

Agent of partnership, §4-47-402.

**Applicability of provisions.**

Existing relationships, §4-47-1206.

Foreign limited partnerships, §4-47-901.

Law governing relationships and liability, §4-47-106.

Partnership agreement, effect and scope, §4-47-110.

Principles of law and equity, §4-47-107.

Uniformity of application and construction, §4-47-1201.

**Articles of conversion**, §4-47-1104.**Articles of merger**, §4-47-1108.**Business transactions of partner with partnership**, §4-47-112.**Certificate of authority, foreign limited partnerships.**

Activities not constituting transactions of business, §4-47-903.

Application, §4-47-902.

Cancellation, §4-47-907.

Filing, §4-47-904.

Revocation, §4-47-906.

**Certificate of limited partnership.**

Amendment, §4-47-202.

Certificate of existence, §4-47-209.

Contents, §4-47-201.

Filing.

Constructive notice, §4-47-103.

Required, §4-47-201.

Restatement, §4-47-202.

Signing of records, §§4-47-204, 4-47-205.

**Citation of provisions**, §4-47-101.**Conflicting names.**

Application for authorization to use, §4-47-108.

**Consent of partners.**

Actions taken requiring, §4-47-118.

**Construction of statutory provisions.**

Conversion and merger, §4-47-1113.

Effective date, §4-47-1204.

Effect of designation, §4-47-1208.

**LIMITED PARTNERSHIPS —Cont'd**  
**Construction of statutory provisions**  
 —Cont'd

Electronic signatures in global commerce act.

Relationship, §4-47-1203.

Savings clause, §4-47-1207.

\* Severability, §4-47-1202.

Uniformity of application and construction, §4-47-1201.

**Contributions.**

Conversion and merger.

Liability of general partner following conversion or merger, §4-47-1111.

Disposition of assets at dissolution, §4-47-812.

Form of contribution, §4-47-501.

Obligation to contribute, §4-47-502.

**Conversion and merger, §§4-47-1101 to 4-47-1113.**

Articles of conversion, §4-47-1104.

Articles of merger, §4-47-1108.

Construction of statutory provisions, §4-47-1113.

Definitions, §4-47-1101.

Effective date of conversion, §4-47-1104.

Effect of conversion, §4-47-1105.

Effect of merger, §4-47-1109.

Foreign organization that is converted.

Consent to jurisdiction, §4-47-1105.

Foreign organization that is survivor of merger.

Consent to jurisdiction, §4-47-1109.

Liability of general partner following conversion or merger, §4-47-1111.

Limitations and restrictions on conversion and merger, §4-47-1110.

Plan of conversion, §4-47-1103.

Plan of merger, §§4-47-1106, 4-47-1107.

Power to bind organization following conversion or merger, §4-47-1112.

Prerequisites to conversion, §4-47-1102.

Prerequisites to merger, §4-47-1106.

**Correcting of filed records, §4-47-207.**

**Creditor's rights.**

Assets, disposition at dissolution, §4-47-812.

Claims against general partner, barring of, §4-47-808.

Claims known at time of dissolution, §4-47-806.

Claims not known at time of dissolution, §4-47-807.

**LIMITED PARTNERSHIPS —Cont'd**  
**Creditor's rights —Cont'd**

Transferable interests, §4-47-703.

**Death of partner.**

Disposition of assets at dissolution, liability of estate, §4-47-812.

Powers of estate of deceased partner, §4-47-704.

**Definitions, §4-47-102.**

Conversion and merger, §4-47-1101.

**Delivery of records to secretary of state, §4-47-206.**

**Derivative actions, §§4-47-1002 to 4-47-1005.**

Complaints, §4-47-1004.

Proceeds and costs, §4-47-1005.

Proper plaintiff, §4-47-1003.

Right to maintain, §4-47-1002.

**Designation as, effect of, §4-47-1208.**

**Dissociation, §§4-47-601 to 4-47-607.**

Conversion and merger.

Power to bind organization following conversion or merger, §4-47-1112.

Distributions not made due to, §4-47-505.

General partners, §4-47-603.

Binding of partnership after dissociation but before dissolution, §4-47-606.

Effect of dissociation, §4-47-605.

Liability for obligations prior to and after dissociation, §4-47-607.

Wrongful dissociation, §4-47-604.

Limited partners, §4-47-601.

Effect of dissociation, §4-47-602.

Notice of, §4-47-103.

**Dissolution, §§4-47-801 to 4-47-812.**

Administrative dissolution, §4-47-809.

Reinstatement following, §4-47-810.

Appeal of denial, §4-47-811.

Assets, disposition of, §4-47-812.

Claims against general partner, barring of, §4-47-808.

Claims known at time of dissolution, §4-47-806.

Claims not known at time of dissolution, §4-47-807.

General partner, claims against, §4-47-808.

Judicial dissolution, §4-47-802.

Liability for obligations incurred after, §4-47-805.

Nonjudicial dissolution, §4-47-801.

Power to bind partnership after, §4-47-804.

Requirements for nonjudicial dissolution, §4-47-801.

**LIMITED PARTNERSHIPS —Cont'd****Dissolution —Cont'd**

Statement of termination, §4-47-203.

Signatures, §§4-47-204, 4-47-205.

Winding up, §4-47-803.

**Distributions.**

Dissociation, no distribution due to, §4-47-505.

Form, §4-47-506.

Improper distributions, §4-47-509.

In kind distribution, §4-47-506.

Interim distributions, §4-47-504.

Limitations and restrictions, §4-47-508.

Offsets for amounts owed to partnership, §4-47-507.

Right to generally, §4-47-507.

Sharing among partners, §4-47-503.

**Dual capacity of partner, §4-47-113.****Duration of entity, §4-47-104.****Electronic signatures in global commerce act.**

Relationship, §4-47-1203.

**Existing relationships, applicability, §4-47-1206.****False information in records, §4-47-208.****Fees.**

Filing fees, §§4-47-1301, 4-47-1302.

**Filing of records by secretary of state, §4-47-206.**

Fees, §§4-47-1301, 4-47-1302.

**Foreign limited partnerships,**

§§4-47-901 to 4-47-908.

Action to restrain transacting of business, §4-47-908.

Activities not constituting transactions of business, §4-47-903.

Certificate of authority.

Activities not constituting transactions of business, §4-47-903.

Application, §4-47-902.

Cancellation, §4-47-907.

Filing, §4-47-904.

Revocation, §4-47-906.

Law governing, §4-47-901.

Names, §4-47-905.

Ownership of property.

Activities constituting transactions of business, §4-47-903.

**Formation, §§4-47-201 to 4-47-210.****Future limited partnerships.**

Formation, §4-47-1209.

**General partners, §§4-47-401 to 4-47-408.**

Actions by and against partnership and partners, §4-47-405.

**LIMITED PARTNERSHIPS —Cont'd****General partners —Cont'd**

Agent of partnership, §4-47-402.

Becoming a general partner, §4-47-401.

Binding the partnership, §4-47-402.

Conduct, standards of, §4-47-408.

Consent of, when necessary, §4-47-406.

Conversion and merger.

Liability of general partner following conversion or merger, §4-47-1111.

Power to bind organization following conversion or merger, §4-47-1112.

Dissociation, §4-47-603.

Binding of partnership after dissociation but before dissolution, §4-47-606.

Effect of dissociation, §4-47-605.

Liability for obligations prior to and after dissociation, §4-47-607.

Wrongful dissociation, §4-47-604.

Dissolution.

Liability for obligations incurred after, §4-47-805.

Power to bind partnership after, §4-47-804.

Distributions.

Liability for consent to improper distributions, §4-47-509.

Dual capacity as limited partner, §4-47-113.

Execution of judgments against, §4-47-405.

Fiduciary duties, §4-47-408.

Liability of generally, §4-47-404.

Liability of partnership for actionable conduct of, §4-47-403.

Management rights, §4-47-406.

Reimbursement of, §4-47-406.

Right to information, §4-47-407.

Standards of conduct and duties owed to partnership, §4-47-408.

**General provisions, §§4-47-101 to 4-47-118.****Indebtedness.**

Distributions, §4-47-508.

**Information to be kept at designated office, §4-47-111.**

Limited partners.

Demand for information, §4-47-304.

**Interest rates, §4-47-107.****Knowledge.**

When person has notice and knowledge, §4-47-103.

**Law governing relationships and liability, §4-47-106.**

**LIMITED PARTNERSHIPS —Cont'd**  
**Liability.**

Contributions.

Obligation to contribute, §4-47-502.

Conversion and merger.

Liability of general partner following  
conversion or merger,  
§4-47-1111.Limitations and restrictions on  
conversion and merger,  
§4-47-1110.

Dissociation.

Binding of partnership after  
dissociation but before  
dissolution, §4-47-606.Liability for obligations prior to and  
after dissociation, §4-47-607.

Wrongful dissociation, §4-47-604.

Dissolution.

Liability for obligations incurred  
after, §4-47-805.

Distributions.

Improper distributions, §4-47-509.

General partners, §4-47-404.

Limited partners, §4-47-303.

Partnership, liability for actionable  
conduct of general partner,  
§4-47-403.**Limitation of actions.**Dissolution, claims not known at time  
of, §4-47-807.

Improper distributions, §4-47-509.

**Limited partners, §§4-47-301 to**  
**4-47-306.**

Becoming a limited partner, §4-47-301.

Demand for information, §4-47-304.

Dissociation, §4-47-601.

Dual capacity as general partner,  
§4-47-113.

Duties, §4-47-305.

Liability generally, §4-47-303.

Person erroneously believing self as  
limited partner, §4-47-306.

Power to bind partnership, §4-47-302.

**Loans.**Business transactions of partner with  
partnership, §4-47-112.**Merger.**Conversion and merger, §§4-47-1101 to  
4-47-1113.**Names, §4-47-108.**Foreign limited partnerships,  
§4-47-905.

Reservation of name, §4-47-109.

**Nature of entity, §4-47-104.****Notice.**

Dissolution.

Claims known at time of dissolution,  
§4-47-806.**LIMITED PARTNERSHIPS —Cont'd**  
**Notice —Cont'd**

Dissolution —Cont'd

Claims not known at time of  
dissolution, §4-47-807.

Foreign limited partnerships.

Certificate of authority, revocation,  
§4-47-906.When person has notice and  
knowledge, §4-47-103.**Order for signature or unsigned**  
**filing of document, §4-47-205.****Partnership agreements.**Conversion and merger, limitations  
and restrictions, §4-47-1110.Distributions in violation of,  
prohibited, §4-47-508.

Effect and scope, §4-47-110.

Inconsistency with certificate of  
limited partnership, §4-47-201.**Powers, §4-47-105.****Priority of disposition of assets at**  
**dissolution, §4-47-812.****Proxies of partners for consent**  
**purposes, §4-47-118.****Purpose of entity, §4-47-104.****Records.**

Correcting of filed records, §4-47-207.

Delivery to and filing by secretary of  
state, §4-47-204.Filing of records by secretary of state,  
§4-47-206.

General partners.

Right to information, §4-47-407.

Information to be kept at designated  
office, §4-47-111.Liability for false information,  
§4-47-208.

Limited partners.

Right to inspect and request  
information, §4-47-304.Signing of records, §§4-47-204,  
4-47-205.**Registered agents.**Change of office and agent for service,  
§4-47-115.Designation of office and agent for  
service, §4-47-114.**Reinstatement following**  
**administrative dissolution,**  
**§4-47-810.**

Appeal of denial, §4-47-811.

**Reports.**Annual report to secretary of state,  
§4-47-210.**Service of process.**

Administrative dissolution.

Appeal of denial of reinstatement,  
§4-47-811.

**LIMITED PARTNERSHIPS —Cont'd****Service of process —Cont'd**

Change of office and agent for service,  
§4-47-115.

Conversion and merger.

Foreign organization that is  
converted.

Consent to jurisdiction,  
§4-47-1105.

Foreign organization that is survivor  
of merger.

Consent to jurisdiction,  
§4-47-1109.

Designation of office and agent for  
service, §4-47-114.

**Severability of provisions,**  
§4-47-1202.

**Signatures.**

Records filed with secretary,  
§§4-47-204, 4-47-205.

**Statement of termination,** §4-47-203.  
Signatures, §§4-47-204, 4-47-205.

**Statute of limitations.**

Dissolution, claims not known at time  
of, §4-47-807.

Improper distributions, §4-47-509.

**Supplemental principles of law and  
equity,** §4-47-107.

**Title of provisions,** §4-47-101.

**Transferable interests.**

Creditor's rights, §4-47-703.

Effect of transfer, §4-47-702.

Estate of deceased partner, rights of,  
§4-47-704.

Status as personal property,  
§4-47-701.

Transfer of, §4-47-702.

**Winding up, §4-47-803.**

Statement of termination, §4-47-203.

Signatures, §§4-47-204, 4-47-205.

**LIQUIDATION.**

**Going out of business sales,**  
§§4-74-101 to 4-74-111.

**LIVESTOCK.****Farm machinery.**

Hour meters on farm machinery,  
§§4-96-201, 4-96-202.

Alteration prohibited, §4-96-201.

Conspiracy to violate subchapter,  
§4-96-202.

Misdemeanors.

Violation of subchapter, §4-96-202.

Tampering prohibited, §4-96-201.

**LOANS.****Income tax.**

Refund anticipation loans, §§4-116-101  
to 4-116-108.

**LOANS —Cont'd****Limited partnerships.**

Business transactions of partner with  
partnership, §4-47-112.

**Refund anticipation loans,**  
§§4-116-101 to 4-116-108.

**LOST OUR LEASE SALES.**

**General provisions,** §§4-74-101 to  
4-74-111. ~

**LUBRICANTS.**

**Quality specifications for engine  
fuels, petroleum products and  
automotive lubricants,**  
§§4-108-201 to 4-108-213.

**M****MACHINERY.**

**Retailer franchise protection,**  
§§4-72-301 to 4-72-311.

**MAIL.****Solicitation.**

Mail and telephone solicitation sales,  
§§4-95-101 to 4-95-108.

**MAIL AND TELEPHONE  
SOLICITATION SALES,**  
§§4-95-101 to 4-95-108.

**Citation of act,** §4-95-101.

**Consumer product.**

Defined, §4-95-102.

**Definitions,** §4-95-102.

**Division.**

Defined, §4-95-102.

**Exemptions from act,** §4-95-107.

**Gift or prize.**

Defined, §4-95-102.

**Identification of caller,** §4-99-201.

**Inapplicability of act,** §4-95-107.

**Injunctions.**

Unlawful practices, §4-95-104.

**Offers of gifts and prizes.**

"Gift or prize" defined, §4-95-102.

Unlawful practices, §4-95-105.

**Penalties.**

Civil penalties, §4-95-104.

Criminal penalties, §4-95-103.

Violations of act.

Voidness and unenforceability of  
purchase agreements, §4-95-108.

**Product promoter.**

Defined, §4-95-102.

**Purchase agreements.**

Contents, §4-95-106.

Disclosure statement, §4-95-106.

Generally, §4-95-106.

**MAIL AND TELEPHONE****SOLICITATION SALES —Cont'd****Purchase agreements —Cont'd**

Violation of act.

Voidness and unenforceability of agreement, §4-95-108.

Waiver or attempt to waive provisions.

Voidness and unenforceability of act, §4-95-108.

**Title of act, §4-95-101.****Unlawful practices.**

Civil penalties, §4-95-104.

Criminal penalties, §4-95-103.

Offers of gifts or prizes, §4-95-105.

"Gift or prize" defined, §4-95-102.

**MARKETING.****Mail and telephone solicitation sales, §§4-95-101 to 4-95-108.****MARRIAGE.****Statute of frauds.**

Charges upon agreements made in consideration of marriage, §4-59-101.

**MEDIA.****Monopolies and restraint of trade.**

Discrimination.

News furnishing, §4-75-503.

**MERGER OR CONSOLIDATION.****Limited partnerships, conversion and merger, §§4-47-1101 to 4-47-1113.**

Articles of conversion, §4-47-1104.

Articles of merger, §4-47-1108.

Construction of statutory provisions, §4-47-1113.

Definitions, §4-47-1101.

Effective date of conversion, §4-47-1104.

Effect of conversion, §4-47-1105.

Effect of merger, §4-47-1109.

Foreign organization that is converted.

Consent to jurisdiction, §4-47-1105.

Foreign organization that is survivor of merger.

Consent to jurisdiction, §4-47-1109.

Liability of general partner following conversion or merger, §4-47-1111.

Limitations and restrictions on conversion and merger, §4-47-1110.

Plan of conversion, §4-47-1103.

Plan of merger, §§4-47-1106, 4-47-1107.

Power to bind organization following conversion or merger, §4-47-1112.

Prerequisites to conversion, §4-47-1102.

**MERGER OR CONSOLIDATION**

—Cont'd

**Limited partnerships, conversion and merger —Cont'd**

Prerequisites to merger, §4-47-1106.

**Partnerships, §§4-46-906 to 4-46-913.****MILK AND MILK PRODUCTS.****Damages.**

Unfair trade practices.

Violations of provisions, §4-75-809.

**Definitions.**

Unfair trade practices, §4-75-802.

Equivalent competitive prices, §4-75-805.

**Dumping.**

Unfair trade practices.

Sales at less than equivalent competitive price, §4-75-805.

**Injunctions.**

Unfair trade practices.

Violations of provisions, §4-75-809.

**Monopolies and restraint of trade.**

Discrimination.

Buying milk, cream, butter, butter fat, poultry, eggs, grain or cottonseed, §4-75-502.

Unfair trade practices, §§4-75-801 to 4-75-809.

**Penalties.**

Unfair trade practices, §§4-75-804, 4-75-807.

**Remedies.**

Unfair trade practices, §4-75-809.

**State institutions.**

Unfair trade practices.

Exceptions, §4-75-803.

**Treble damages.**

Unfair trade practices, §4-75-809.

**Unfair trade practices.**

Costs.

Defined, §4-75-802.

Rebates, refunds, etc., considered as costs, §4-75-806.

Damages.

Violations of provisions, §4-75-809.

Definitions, §4-75-802.

Equivalent competitive prices, §4-75-805.

Dumping.

Sales at less than equivalent competitive price, §4-75-805.

Equipment.

Furnishing equipment free or at less than cost.

Prohibited, §4-75-808.

Exceptions, §4-75-808.

Exceptions.

Certain institutions, §4-75-803.

**MILK AND MILK PRODUCTS**

—Cont'd

**Unfair trade practices —Cont'd**

Fresh dairy products.

Limiting quantity of purchase.

Prohibited, §4-75-807.

Injunctions.

Violations of provisions, §4-75-809.

Legislative intent, §4-75-801.

Limiting quantity of purchase of fresh dairy products.

Prohibited, §4-75-807.

Penalties.

Fresh dairy products.

Limiting quantity of purchase,  
§4-75-807.

Violations of provisions, §4-75-804.

Purpose of provisions, §4-75-801.

Rebates, refunds, etc., considered as costs, §4-75-806.

Sales.

Sales at less than equivalent competitive prices.

Prohibited, §4-75-805.

Violations.

Fresh dairy products.

Limiting quantity of purchase,  
§4-75-807.

Violations of provisions.

Damages, §4-75-809.

Injunctions, §4-75-809.

Penalties, §4-75-804.

**Violations.**

Unfair trade practices.

Fresh dairy products.

Limiting quantity of purchase,  
§4-75-807.**MONOPOLIES AND RESTRAINT OF TRADE.****Actions.**

Automobile dealer's anti-coercion act.

Double damages actions of injured parties, §4-75-412.

By attorney general, §4-75-315.

Statute of limitations, §4-75-320.

Unfair practices, §4-75-217.

Unfair practices, §4-75-212.

Venue, §4-75-319.

Unfair practices, §4-75-216.

Discrimination.

Price of manufactured items, coal oil or dressed beef.

Recovery of forfeitures, §4-75-501.

Interstate or foreign commerce.

Actions not barred because it affects, §4-75-318.

Precedence of actions brought under subchapter, §4-75-308.

**MONOPOLIES AND RESTRAINT OF TRADE —Cont'd****Actions —Cont'd**

Unfair practices.

Interstate or foreign commerce.

Action not barred because it affects, §4-75-215.

**Agriculture.**

Discrimination.

Buying milk, cream, butter, butterfat, poultry, eggs, grain or cotton seed, §4-75-502.

**Antitrust enforcement account.**

Established in office of attorney general, §4-75-317.

Unfair practices.

Established in office of attorney general, §4-75-214.

**Attorney general.**

Actions and settlements by, §4-75-315.

Statute of limitations, §4-75-320.

Venue, §4-75-319.

Antitrust enforcement account.

Established in office, §4-75-317.

Unfair practices.

Actions by, §4-75-212.

Statute of limitations, §4-75-217.

Venue, §4-75-216.

Antitrust enforcement account.

Established in office of attorney general, §4-75-214.

**Automobile dealer's anti-coercion act.**

Actions by injured parties, §4-75-412.

Citation of subchapter, §4-75-401.

Construction and interpretation.

Cumulative nature of subchapter, §4-75-403.

Contracts violating subchapter.

Void, §4-75-407.

Cumulative nature of subchapter, §4-75-403.

Definitions, §4-75-402.

Discrimination.

Unlawful discrimination, §4-75-411.

Dissolution for violations, §4-75-405.

Double damages.

Actions by injured parties, §4-75-412.

Exclusive financing agreements.

Prohibition, §4-75-408.

Threats as prima facie evidence, §4-75-409.

Threats presumed made at direction of manufacturer or distributor, §4-75-410.

Financing, purchase or sale.

Exclusive financing agreements. Prohibition, §4-75-408.

**MONOPOLIES AND RESTRAINT OF TRADE —Cont'd****Automobile dealer's anti-coercion act —Cont'd**

Financing, purchase or sale —Cont'd  
Exclusive financing agreements

—Cont'd

Threats as prima facie evidence,  
§4-75-409.

Threats presumed made at  
direction of manufacturer or  
distributor, §4-75-410.

Foreign corporations.

Prohibition from doing business  
upon violation of subchapter,  
§4-75-406.

Forfeiture of charter rights for  
violation, §4-75-405.

Penalties.

Persons subject to penalties,  
§4-75-404.

Separate offense for each day's  
violation, §4-75-404.

Persons.

Defined, §4-75-402.

Purchases.

Defined, §4-75-402.

Sales.

Defined, §4-75-402.

Subsidies.

Unlawful subsidies, §4-75-411.

Threats.

Exclusive financing agreements.

Evidentiary effect of threats,  
§4-75-409.

Title of subchapter, §4-75-401.

Unlawful subsidies or discrimination.

Prohibited, §4-75-411.

Wholesale distribution.

Defined, §4-75-402.

**Civil penalties.**

Actions by attorney general, §4-75-315.

Unfair practices, §4-75-212.

**Coercion.**

Automobile dealers, §§4-75-401 to  
4-75-412.

**Commerce.**

Lawful commerce excepted from  
prohibition, §4-75-303.

**Conflict of laws.**

Unfair practices act.

Provisions controlling, §4-75-211.

**Consent decrees.**

In lieu of action by attorney general,  
§4-75-315.

Unfair practices.

Acceptance by attorney general in  
lieu of action, §4-75-212.

**MONOPOLIES AND RESTRAINT OF TRADE —Cont'd****Conspiracy.**

Fixing prices or quantity of products.

Prohibited, §4-75-309.

Lawful commerce excepted, §4-75-303.

**Construction and interpretation.**

Automobile dealer's anti-coercion act.

Cumulative nature of subchapter,  
§4-75-403.

Unfair practices.

Liberal construction of subchapter,  
§4-75-203.

**Contracts.**

Automobile dealer's anti-coercion act.

Voidness of contracts violating  
subchapter, §4-75-407.

Unfair practices.

No recovery on contract violating  
act, §4-75-206.

**Corporations.**

Charters.

Unfair practices.

Forfeiture of charter on third  
violation, §4-75-205.

Officers, directors, agents and  
employees.

Unfair practices.

Proof of unlawful intent,  
§§4-75-209, 4-75-210.

Unfair practices.

Charters.

Forfeiture, §4-75-205.

Officers, directors, agents and  
employees, §§4-75-209, 4-75-210.

**Damages.**

Actions by attorney general, §4-75-315.

Automobile dealer's anti-coercion act.

Double damages.

Actions by injured parties for  
double damages, §4-75-412.

Discrimination.

News furnishing.

Recovery by those discriminated  
against, §4-75-503.

Unfair practices.

Action by attorney general,  
§4-75-212.

Violations of provisions, §4-75-211.

**Declaratory judgments.**

Action by attorney general.

Unfair practices, §4-75-212.

Actions by attorney general, §4-75-315.

**Definitions, §4-75-301.**

Automobile dealer's anti-coercion act,  
§4-75-402.

Person, §4-75-316.

Unfair practices, §4-75-213.

## **MONOPOLIES AND RESTRAINT OF TRADE —Cont'd**

### **Discrimination.**

#### **Actions.**

Price of manufactured products, coal oil or dressed beef.

Recovery of forfeitures, §4-75-501.

Automobile dealer's anti-coercion act.

Unlawful subsidies or

discrimination, §4-75-411.

Buying milk, cream, butter, butterfat, poultry, eggs, grain or cotton seed.

#### **Injunctions.**

Suit by attorney general to enjoin continuance of business, §4-75-502.

#### **Penalties.**

Violations of provisions, §4-75-502.

Prohibited acts, §4-75-502.

#### **Damages.**

News furnishing.

Recovery by those discriminated against, §4-75-503.

#### **Injunctions.**

Buying milk, cream, butter, butterfat, poultry, eggs, grain or cotton seed.

Suit by attorney general to enjoin continuance of business, §4-75-502.

#### **Joinder.**

Price of manufactured products, coal oil or dressed beef.

Actions for recovery of forfeitures.

Joinder of offenses, §4-75-501.

#### **News furnishing.**

#### **Damages.**

Recovery by those discriminated against, §4-75-503.

#### **Penalties.**

Transmission of prohibited news, §4-75-503.

Violations of provisions, §4-75-503.

#### **Uniform rates.**

Required, §4-75-503.

#### **Penalties.**

Buying milk, cream, butter, butterfat, poultry, eggs, grain or cotton seed.

Violations of provisions, §4-75-502.

News furnishing, §4-75-503.

#### **Price discrimination.**

Commodity purchases, §4-75-502.

Manufactured products, coal oil or dressed beef, §4-75-501.

#### **News.**

Furnishing or transmitting, §4-75-503.

## **MONOPOLIES AND RESTRAINT OF TRADE —Cont'd**

### **Discrimination —Cont'd**

Price of manufactured products, coal oil or dressed beef.

#### **Actions.**

Recovery of forfeitures, §4-75-501.

Joinder of offenses, §4-75-501.

Service of process, §4-75-501.

Venue, §4-75-501.

Prohibited acts, §4-75-501.

Forfeitures for, §4-75-501.

#### **Service of process.**

Price of manufactured products, coal oil or dressed beef.

Actions for recovery of forfeitures, §4-75-501.

#### **Venue.**

Price of manufactured products, coal oil or dressed beef.

Actions for recovery of forfeitures, §4-75-501.

### **Dissolution of monopolies.**

Automobile dealer's anti-coercion act.

Forfeiture of charter rights and dissolution for violations, §4-75-405.

### **Driving out competition.**

Creation of monopoly by.

Penalty, §4-75-310.

### **Evidence.**

Automobile dealer's anti-coercion act.

Exclusive financing agreements.

Threats as prima facie evidence, §4-75-409.

### **Exclusive financing agreements.**

Automobile dealer's anti-coercion act, §§4-75-408 to 4-75-410.

### **Foreign corporations.**

Automobile dealer's anti-coercion act.

Prohibition on doing business upon violation of subchapter, §4-75-406.

### **Forfeitures.**

Automobile dealer's anti-coercion act.

Charter rights may be forfeited for violation of provisions, §4-75-405.

### **Injunctions.**

Actions by attorney general, §4-75-315.

#### **Unfair practices.**

Action by attorney general, §4-75-212.

Violations of provisions, §4-75-211.

### **Interstate or foreign commerce.**

Action not barred because it affects, §4-75-318.

Unfair practices, §4-75-215.

**MONOPOLIES AND RESTRAINT OF TRADE —Cont'd****Joinder.**

Discrimination.

Price of manufactured products, coal oil or dressed beef.

Actions for recovery of forfeitures.

Joinder of offenses, §4-75-501.

**Milk and milk products.**

Discrimination.

Buying milk, cream, butter, butterfat, poultry, eggs, grain or cotton seed, §4-75-502.

Unfair trade practices, §§4-75-801 to 4-75-809.

**Motion pictures.**

Fair practices, §§4-75-901 to 4-75-906.

**News media.**

Discrimination.

News furnishing, §4-75-503.

**Penalties.**

Automobile dealer's anti-coercion act.

Persons subject to penalties, §4-75-404.

Discrimination.

Buying milk, cream, butter, butterfat, poultry, eggs, grain or cotton seed.

Violations of provisions, §4-75-502.

News furnishing, §4-75-503.

Formation of monopoly.

Creation of monopoly by driving out competition, §4-75-310.

Prohibition on monopoly, §4-75-302.

Unfair practices.

Violations of act, §4-75-204.

**Person defined, §4-75-316.****Presumptions.**

Automobile dealer's anti-coercion act.

Exclusive financing agreements.

Threats presumed made at direction of manufacturer or distributor, §4-75-410.

**Price discrimination.**

Commodity purchases, §4-75-502.

Manufactured products, coal oil or dressed beef, §4-75-501.

News.

Furnishing or transmitting, §4-75-503.

**Price fixing.**

Conspiracies or combinations to fix prices or quantity of products.

Prohibited, §4-75-309.

**Prohibited, §4-75-302.****Rebates.**

Unfair practices.

Secret payment prohibited, §4-75-208.

**MONOPOLIES AND RESTRAINT OF TRADE —Cont'd****Rebates —Cont'd**

Unfair practices —Cont'd

Special rebates prohibited, §4-75-207.

**Restitution.**

Actions by attorney general, §4-75-315.

Unfair practices, §4-75-212.

**Sales.**

Unfair practices.

Sale at less than cost or with intent to injure competitors, §4-75-209.

**Service of process.**

Discrimination.

Price of manufactured products, coal oil or dressed beef.

Actions for recovery of forfeitures, §4-75-501.

**Statute of limitations.**

Actions by attorney general, §4-75-320.

Unfair practices, §4-75-217.

**Threats.**

Automobile dealer's anti-coercion act.

Exclusive financing agreements.

Evidentiary effect of threats, §4-75-409.

Presumption that threats made at direction of manufacturer or distributor, §4-75-410.

**Unfair practices.**

Action by attorney general, §4-75-212.

Statute of limitations, §4-75-217.

Venue, §4-75-216.

Antitrust enforcement account.

Established in office of attorney general, §4-75-214.

Citation of act.

Short title, §4-75-201.

Civil penalties.

Action by attorney general, §4-75-212.

Conflict of laws.

Provisions of act controlling, §4-75-211.

Consent decree.

Acceptance by attorney general in lieu of action, §4-75-212.

Construction and interpretation, §4-75-203.

Contracts.

No recovery on contract violating act, §4-75-206.

Corporations.

Charter.

Forfeiture for third violation, §4-75-205.

## **MONOPOLIES AND RESTRAINT OF TRADE —Cont'd**

### **Unfair practices —Cont'd**

#### **Corporations —Cont'd**

Officers, directors and agents.

Proof of unlawful intent,  
§§4-75-209, 4-75-210.

Responsibility for violations,  
§4-75-210.

Cumulative nature of act, §4-75-211.

#### **Damages.**

Violations of provisions, §4-75-211.

#### **Damages or restitution.**

Action by attorney general,  
§4-75-212.

#### **Declaratory judgment.**

Action by attorney general,  
§4-75-212.

#### **Definitions.**

Person, §4-75-213.

#### **Discrimination.**

Prohibited acts, §4-75-207.

#### **Injunctions.**

Action by attorney general,  
§4-75-212.

Violations of provisions, §4-75-211.

#### **Interstate or foreign commerce.**

Action not barred because it affects,  
§4-75-215.

#### **Legislative intent, §4-75-202.**

#### **Misdemeanors.**

Sale at less than cost or with intent  
to injure competitors, §4-75-209.

Secret payments or allowance of  
rebates, refunds, commissions or  
unearned discounts, §4-75-208.

Violations of provisions generally,  
§4-75-204.

#### **Penalties.**

Violations of provisions, §4-75-204.

#### **Person defined, §4-75-213.**

#### **Price discrimination, §4-75-207.**

#### **Prohibited acts, §§4-75-207 to 4-75-209.**

#### **Purpose of provisions, §4-75-202.**

#### **Rebates.**

Secret payment, §4-75-208.

Special rebates prohibited,  
§4-75-207.

Sale at less than cost or with intent to  
injure competitors, §4-75-209.

Establishing cost of article or  
product, §4-75-209.

Exceptions, §4-75-209.

Proof of unlawful intent, §4-75-209.

Secret payments or allowances of  
rebates, refunds, commissions or  
unearned discounts, §4-75-208.

## **MONOPOLIES AND RESTRAINT OF TRADE —Cont'd**

### **Unfair practices —Cont'd**

Severability of provisions, §4-75-211.

#### **Statute of limitations.**

Action by attorney general,  
§4-75-217.

#### **Title of act.**

Short title, §4-75-201.

Unfair cigarette sales, §§4-75-701 to  
4-75-714.

Venue of actions by attorney general,  
§4-75-216.

Witnesses, §4-75-211.

### **Venue.**

Actions by attorney general, §4-75-319.

#### **Discrimination.**

Price of manufactured products, coal  
oil or dressed beef.

Actions for recovery of forfeiture,  
§4-75-501.

#### **Unfair practices.**

Actions by attorney general,  
§4-75-216.

### **Witnesses.**

Unfair practices, §4-75-211.

## **MOTION PICTURES.**

### **Definitions.**

Fair practices, §4-75-902.

### **Fair practices.**

#### **Bidding.**

##### **Blind bidding.**

Defined, §4-75-902.

Invitation to bid, §4-75-906.

Prohibited, §4-75-905.

Definition of "bid," §4-75-902.

Invitation to bid, §4-75-906.

Procedures, §4-75-906.

Definitions, §4-75-902.

#### **Injunctions.**

Violations of provisions, §4-75-904.

#### **Legislative declaration.**

Purpose of act, §4-75-901.

#### **Penalties.**

Violations of provisions, §4-75-903.

Purpose of act, §4-75-901.

#### **Violations.**

Violations of provisions, §4-75-903.

Violations of provisions.

Injunctions, §4-75-904.

### **Injunctions.**

Fair practices.

Violations of provisions, §4-75-904.

### **Penalties.**

Fair practices.

Violations of provisions, §4-75-903.

### **Violations.**

Fair practices.

Violations of provisions, §4-75-903.

**MOTOR FUELS.**

**Quality specifications for engine fuels, petroleum products and automotive lubricants,**  
§§4-108-201 to 4-108-213.

**MOTOR FUEL TAX.**

**Contract provision requiring reimbursement of federal excise taxes.**

Optional manner of reimbursement.  
Exercise by reimbursing party,  
notice, §4-56-103.

**MOTOR VEHICLE ACCIDENTS.**

**Aftermarket crash parts,** §§4-90-301 to 4-90-307.

**MOTOR VEHICLE DEALERS.**

**Aftermarket crash parts,** §§4-90-301 to 4-90-307.

**Automotive parts dealers.**

Aftermarket crash parts, §§4-90-301 to 4-90-307.

**Coercion.**

Automobile dealer's anti-coercion act,  
§§4-75-401 to 4-75-412.

**Financing, purchase or sale.**

Automobile dealer's anti-coercion act,  
§§4-75-401 to 4-75-412.

**Monopolies and restraint of trade.**

Automobile dealer's anti-coercion act,  
§§4-75-401 to 4-75-412.

**Parts dealers.**

Aftermarket crash parts, §§4-90-301 to 4-90-307.

**Sales.**

Financing, purchase or sale.  
Automobile dealer's anti-coercion  
act, §§4-75-401 to 4-75-412.

**MOTOR VEHICLE INSURANCE.****Rental vehicles.**

Costs of rental.  
Lemon law reimbursement,  
§4-90-408.

**Service contracts,** §§4-90-501 to 4-90-512.

Applicability, §4-90-503.  
Disclosures, §4-90-506.  
Enforcement, §4-90-510.  
Exclusive governance of provisions,  
§4-90-504.  
Form of contracts, §4-90-512.  
Holder.  
Defined, §4-90-502.  
Incidental benefits, §4-90-508.  
Mandatory insurance, §4-90-505.  
Mechanical breakdown insurance.  
Defined, §4-90-502.

**MOTOR VEHICLE INSURANCE**

—Cont'd

**Service contracts —Cont'd**

Motor vehicle.  
Defined, §4-90-502.  
Motor vehicle service contract.  
Defined, §4-90-502.  
Motor vehicle service contract  
provider.  
Defined, §4-90-502.  
Motor vehicle service contract  
reimbursement insurance policy.  
Defined, §4-90-502.  
Provider.  
Defined, §4-90-502.  
Refunds, §4-90-507.  
Rules and regulations, §4-90-509.  
Service contract.  
Defined, §4-90-502.  
Service contract holder.  
Defined, §4-90-502.  
Title, §4-90-501.  
Unfair trade practices, §4-90-511.

**MOTOR VEHICLES.**

**Aftermarket crash parts,** §§4-90-301 to 4-90-307.

**Arbitration clauses in sales contracts,** §4-75-413.

**Contracts.**

Arbitration and forum selection  
clauses in sales contracts,  
§4-75-413.  
Service contracts, §§4-90-501 to 4-90-512.

**Forum selection clauses in sales contracts,** §4-75-413.

**Investigations.**

Service contracts, §4-90-509.

**Leases.**

Prohibited transfers, §4-100-103.  
Definitions, §4-100-101.  
Violations, §4-100-102.

**Lemon law,** §§4-90-401 to 4-90-417.

**Manufacturers.**

Aftermarket crash parts, §§4-90-301 to 4-90-307.

**New motor vehicles.**

Quality assurance, §§4-90-401 to 4-90-417.

**Odometer regulations,** §§4-90-201 to 4-90-207.

**Quality assurance.**

New vehicles, §§4-90-401 to 4-90-417.

**Repairs.**

Aftermarket crash parts, §§4-90-301 to 4-90-307.  
Odometer regulations, §§4-90-201 to 4-90-207.

**MOTOR VEHICLES —Cont'd****Repairs —Cont'd**

Repair estimates, §4-90-305.

**Sales.**

Arbitration and forum selection clauses in contracts, §4-75-413.

Resale of returned nonconforming vehicle.

Lemon law, §4-90-412.

**Service contracts**, §§4-90-501 to 4-90-512.

**Transfers.**

Definitions, §4-100-101.

Prohibited practices, §4-100-103.

Violations, §4-100-102.

**Warranties.**

Lemon law, §§4-90-401 to 4-90-417.

**MUSIC.**

**Tickets to live events, restrictions on Internet sales**, §4-70-103.

**N****NAMES.**

**Business under assumed name**, §§4-70-201 to 4-70-206.

**Limited liability partnerships**, §4-46-1002.

**Limited partnerships**, §4-47-108.

Foreign limited partnerships, §4-47-905.

Reservation of name, §4-47-109.

**Partnerships.**

Fictitious name, conducting business under, §4-42-707.

Limited partnerships, §4-47-108.

Assumed name.

Applicability of provisions, §4-70-201.

Foreign limited partnerships, §4-47-905.

Reservation of name, §4-47-109.

**Service contracts.**

Prohibited acts by provider, §4-114-107.

**NEGOTIABLE INSTRUMENTS.**

**Telemarketers submitting for payment.**

Express consent of consumer required, §4-99-203.

**NEWS MEDIA.**

**Monopolies and restraint of trade.**

Discrimination.

News furnishing, §4-75-503.

**NO CALL LISTS**, §§4-99-401 to 4-99-408.

**Applicability of provision**, §4-99-406.

**NO CALL LISTS —Cont'd**

**Arkansas consumer telephone privacy act.**

Short title, §4-99-401.

**Deceptive trade practice.**

Violations, §4-99-407.

**Definition**, §4-99-403.

**Enforcement**, §4-99-407.

**Findings**, §4-99-402.

**Intent**, §4-99-402.

**Persons exempt**, §4-99-406.

**Short title.**

Arkansas consumer telephone privacy act, §4-99-401.

**Statewide database.**

Attorney general to establish, §4-99-404.

Calling number included in database, prohibition, §4-99-405.

Calling number without first accessing database, §4-99-405.

Listing charge, §§4-99-404, 4-99-408.

**NOTARIES PUBLIC.**

**Notario or notario publico.**

Advertising services using terms, §§4-109-101 to 4-109-105.

Attorneys, inapplicability to, §4-109-104.

Definitions, §4-109-101.

Disclosure required in advertisement, §4-109-103.

Prohibited acts or practices, §4-109-102.

Violation unconscionable or deceptive act or practice, §4-109-105.

**NOTARIO OR NOTARIO PUBLICO.**

**Advertising services using terms.**

Restrictions, §§4-109-101 to 4-109-105.

**NOTES.**

**Attorneys at law.**

Fees.

Allowable provisions in promissory notes for fees, §4-56-101.

**NOTICE.**

**Credit reporting disclosures.**

Denial of credit, further extension or increase in limits of existing credit.

Contents of notice of adverse action, §4-93-104.

Responsibility of user of consumer report to notify consumer of adverse action, §4-93-103.

Damages for failure to provide notification, §4-93-104.

**NOTICE —Cont'd****Credit report security freezes.**

Notice of rights, §4-112-111.

Unauthorized access, §4-112-104.

**Franchises.**

Petroleum products franchises.

Dealer-supplier or distributor franchises.

Cancellation, termination or refusal to renew, §4-72-502.

Supplier-distributor franchises.

Cancellation, termination or refusal to renew franchise, §4-72-402.

Termination, cancellation or failure to renew, §4-72-204.

Transfer, assignment or sale of franchise, §4-72-205.

**Health spas.**

Consumer protection.

Cancellation of contracts for health spa services, §4-94-109.

**Home solicitation sales.**

Cancellation of offer or contract, §§4-89-107, 4-89-108.

**Lemon law.**

Claim by consumer, §4-90-404.

**Limited liability partnerships.**

Intent to revoke statement of qualification.

Failure to file annual report, §4-46-1003.

**Limited partnerships.**

Dissolution.

Claims known at time of dissolution, §4-47-806.

Claims not known at time of dissolution, §4-47-807.

Foreign limited partnerships.

Certificate of authority, revocation, §4-47-906.

When person has notice and knowledge, §4-47-103.

**Partnerships, §4-46-102.**

Limited partnerships.

Dissolution.

Claims known at time of dissolution, §4-47-806.

Claims not known at time of dissolution, §4-47-807.

Foreign limited partnerships.

Certificate of authority, revocation, §4-47-906.

When person has notice and knowledge, §4-47-103.

**Personal information protection act.**

Breach of security system, §4-110-105.

**NOTICE —Cont'd****Refund anticipation loans.**

Application disclosures, §4-116-105.

Fee schedules and disclosures to be posted, §4-116-104.

**O****ODOMETER REGULATIONS,**

§§4-90-201 to 4-90-207.

**Civil actions for fraud,** §4-90-207.

**Criminal penalties,** §4-90-203.

**Definitions,** §4-90-202.

**Disclosures upon transfer of vehicle,** §4-90-206.

**Enforcement,** §4-90-203.

**Purpose of act,** §4-90-201.

**Service, repair or replacement,** §4-90-205.

**Tampering,** §4-90-204.

**Violations as unfair trade practices,** §4-90-203.

**OIL AND GAS.****Criminal law and procedure.**

Quality specifications for engine fuels, petroleum products and automotive lubricants, §4-108-209.

**Franchises.**

Petroleum products franchises, §§4-72-401 to 4-72-503.

**Injunctions.**

Quality specifications for engine fuels, petroleum products and automotive lubricants, §4-108-210.

**Penalties.**

Quality specifications for engine fuels, petroleum products and automotive lubricants.

Civil penalties, §4-108-208.

**Quality specifications for engine fuels, petroleum products and automotive lubricants,**

§§4-108-201 to 4-108-213.

Citation of act, §4-108-211.

Civil penalties, §4-108-208.

Criminal penalties, §4-108-209.

Definitions, §4-108-203.

Engine fuels designed for special use.

Registration, §4-108-206.

Injunctions, §4-108-210.

Plant board.

Administration by director, §4-108-204.

Adoption of standards and rules, §§4-108-204, 4-108-212.

State petroleum products division, §4-108-205.

**OIL AND GAS —Cont'd****Quality specifications for engine fuels, petroleum products and automotive lubricants —Cont'd**

- Prohibited acts, §4-108-207.
- Civil penalties, §4-108-208.
- Criminal penalties, §4-108-209.
- Restraining order and injunction, §4-108-210.
- Purpose of provisions, §4-108-201.
- Repeal of prior enabling statute.
  - Regulations unaffected by, §4-108-213.
- Restraining order and injunction, §4-108-210.
- Scope of provisions, §4-108-202.
- Special use.
  - Registration of engine fuels designed for, §4-108-206.
- State petroleum products division, §4-108-205.
- Title of act, §4-108-211.

**ORDERS.****Going out of business sales.**

- Sales under order of court excepted from chapter, §4-74-103.

**P****PARTIES.****Limited partnerships.**

- Derivative actions.
- Proper plaintiff, §4-47-1003.

**PARTNERSHIPS, §§4-46-101 to 4-46-1207.****Access to books and records.**

- Rights of partners to, §4-46-403.

**Account, partner deemed to have, §4-46-401.****Acquisition of property by partnership.**

- Property of partnership, §§4-46-203, 4-46-204.

**Actions.**

- By or against partnerships and partners, §4-46-307.
- By partnership against partner, §4-46-405.
- Liability for partner's actionable conduct, §4-46-305.
- Liability for partnership obligations, §4-46-306.
- Liability of purported partner, §4-46-308.
- Wrongful dissociation, liability, §4-46-602.

**PARTNERSHIPS —Cont'd****Acts of partner.**

- Binding on partnership, §4-46-301.
- Dissociation business not wound up, §4-46-702.
- Dissolution and winding up.
  - Acts after dissolution, §4-46-804.
- Liability of partners for, §4-46-305.

**Advances by partner.**

- Reimbursement, §4-46-401.

**Agent of partnership.**

- Partner deemed, §4-46-301.

**Amendment of chapter.**

- Partnerships subject to, §4-46-107.

**Amendment of statements, §4-46-105.**

- Statement defined, §4-46-101.

**Assumed names.**

- Business under assumed name.
- Exceptions as to certain limited partnerships, §4-70-201.

**Authority of partnership.**

- Statement of, §4-46-303.

**Books and records.**

- Rights and duties, §4-46-403.

**Buyout price.**

- Purchase of partner's interest.
- Dissociation, business not wound up, §4-46-701.

**Cancellation of statements, §4-46-105.**

- Statement defined, §4-46-101.
- Statement of partnership authority.
- By operation of law, §4-46-303.

**Compensation for services performed for partnership, §4-46-401.****Conduct of partners.**

- Standards, §4-46-404.

**Consent of all partners.**

- Act outside ordinary course of business, §4-46-401.
- Becoming partner, §4-46-401.

**Construction of chapter, §4-46-1201.****Continuation after dissolution, §4-46-802.****Continued use of partnership name.**

- Dissociation from partnership.
- Business not wound up, §4-46-705.

**Conversion.**

- Amendment of plan, §4-46-903.
- Articles of conversion, §4-46-904.
- Consent on plan of conversion, §4-46-903.
- Definitions, §4-46-901.
- Effect, §4-46-905.
- Filings required, §4-46-904.
- Foreign organizations, §4-46-905.
- Liability after, §4-46-911.

**PARTNERSHIPS —Cont'd****Conversion —Cont'd**

Limited liability partnership status, relinquishing, §4-46-910.

Permissible conversions, §4-46-902.

Plan of conversion, §4-46-902.

Power of dissociated persons to bind  
' after conversion or merger,  
§4-46-912.

Restrictions, §4-46-910.

Statement of qualification, §4-46-904.

Supplemental nature of provisions,  
§4-46-913.

When effective, §4-46-905.

**Co-owner of partnership property.**

Partner not deemed, §4-46-501.

**Damages.**

Wrongful dissociation, liability,  
§4-46-602.

**Date chapter effective, §4-46-1203.****Definite term.**

Continuation beyond, §4-46-406.

**Definitions, §4-46-101.**

Conversion and merger, §4-46-901.

**Denial of person's authority or status.**

Statement of denial, §4-46-304.

**Determining whether partnership formed.**

Rules applicable, §4-46-202.

**Dissociation from partnership.**

Business not wound up.

Continued use of partnership name,  
§4-46-705.

Partner's power to bind and liability  
to partnership, §4-46-702.

Liability to others, §4-46-703.

Purchase of partner's interest,  
§4-46-701.

Statement of dissociation, §4-46-704.

Effect, §4-46-603.

Events causing, §4-46-601.

Partner's power, §4-46-602.

Wrongful dissociation, §4-46-602.

**Dissolution and winding up.**

Application, events causing, §4-46-801.

Binding partnership after dissolution,  
§4-46-804.

Continuation after dissolution,  
§4-46-802.

Contributions among partners,  
§4-46-807.

Events causing, §4-46-801.

Judicial supervision of winding up,  
§4-46-803.

Liability of partner to other partners,  
§4-46-806.

**PARTNERSHIPS —Cont'd****Dissolution and winding up —Cont'd**

Preservation of business or property.

Person winding up, §4-46-803.

Right to wind up, §4-46-803.

Waiver of right to wind up and  
terminate business, §4-46-802.

Settlement of accounts, §4-46-807.

Statement of dissolution, §4-46-805.

Transferee of partner's transferable  
interest.

Rights of, §4-46-503.

Waiver of right to wind up and  
terminate business, §4-46-802.

**Distributions.**

In kind, §4-46-402.

Transferee of partner's transferable  
interest.

Right to, §4-46-503.

**Due care, duty of, §4-46-404.****Duties of partners, §4-46-401.**

Information, §4-46-403.

Loyalty and due care, §4-46-404.

**Effective date, §4-46-1203.****Entity distinct from partners, §4-46-201.****Execution of judgment against assets of partner, §4-46-307.****Execution of statements, §4-46-105.**

Statement defined, §4-46-101.

**Expulsion of partner.**

Dissociation from partnership.

Events causing, §4-46-601.

**Fees.**

Secretary of state.

Documents delivered by electronic  
means, §4-42-708.

**Fictitious name, conducting business under, §4-42-707.****Fiduciary duties.**

Duty of loyalty and due care,  
§4-46-404.

**Filing statements, §4-46-105.**

Fees, §4-46-1207.

Statement defined, §4-46-101.

**Foreclosures.**

Transferable interest of partner.

Charging order, §4-46-504.

**Foreign limited liability partnerships, §§4-46-1101 to 4-46-1105.****Foreign limited partnerships, §§4-47-901 to 4-47-908.****Formation, §4-46-202.****Governing law, §4-46-106.****Indemnification of partner, §4-46-401.**

**PARTNERSHIPS —Cont'd**  
**Information.**

Rights and duties of partners,  
 §4-46-403.

**In kind distributions,** §4-46-402.

**Interest.**

Rate if rate not specified in obligation,  
 §4-46-104.

**Joint and several liability.**

Obligations of partnership, §4-46-306.

**Judgments.**

Against partnerships, §4-46-307.

Transferable interest of partner.

Charging order, subject to,  
 §4-46-504.

**Knowledge of facts,** §4-46-102.

**Lending money to partnership,**  
 §4-46-404.

**Liability for partner's actionable  
 conduct,** §4-46-305.

**Liability of partner after  
 dissociation.**

Business not wound up, §§4-46-702,  
 4-46-703.

**Liability of partner after  
 dissolution,** §4-46-806.

**Liability of partners for partnership  
 obligations,** §4-46-306.

**Liability of purported partner,**  
 §4-46-308.

**Liens.**

Transferable interest of partner.

Charging order constitutes,  
 §4-46-504.

**Limited liability partnerships,**  
 §§4-46-1001 to 4-46-1105.

**Limited partnerships,** §§4-47-101 to  
 4-47-1302.

**Losses.**

Partner chargeable with equal share,  
 §4-46-401.

Transferable interest of partner,  
 §4-46-502.

**Loyalty, duty of,** §4-46-404.

Dissociation, termination of duty,  
 §4-46-603.

**Management and conduct of  
 business.**

Dissociation from partnership.

Termination of right to participate,  
 §4-46-603.

Equal right of partners to, §4-46-401.

**Merger.**

Amendment of plan, §4-46-907.

Articles of merger, §4-46-908.

Consent to plan, §4-46-907.

Definition, §4-46-901.

Effect of merger, §4-46-909.

**PARTNERSHIPS —Cont'd**  
**Merger —Cont'd**

Filings required, §4-46-908.

Liability after, §4-46-911.

Limited liability partnership status,  
 relinquishing, §4-46-910.

Permissible mergers, §4-46-906.

Plan of merger, §4-46-906.

Power of dissociated persons to bind  
 after conversion or merger,  
 §4-46-912.

Restrictions, §4-46-910.

Supplemental nature of provisions,  
 §4-46-913.

When effective, §§4-46-908, 4-46-909.

**Names.**

Business under assumed names.

Exception as to certain limited  
 partnerships, §4-70-201.

Fictitious name, conducting business  
 under, §4-42-707.

**Notice.**

Giving or receiving notice, §4-46-102.

Partner's notice constitutes notice to  
 partnership, §4-46-102.

**Particular undertaking.**

Continuation beyond, §4-46-406.

**Partnership agreement.**

Governs relations among partners,  
 §4-46-103.

Prohibited provisions, §4-46-103.

**Principles of law and equity.**

Supplemental to chapter, §4-46-104.

**Profits.**

Right to equal share, §4-46-401.

Transferable interest of partner,  
 §4-46-502.

**Property acquired by partnership.**

Property of partnership, §§4-46-203,  
 4-46-204.

**Purchase of partner's interest.**

Dissociation, business not wound up,  
 §4-46-701.

**Purported partners.**

Liability, §4-46-308.

**Recording statements,** §4-46-105.

Statements defined, §4-46-101.

**Recovery of partnership property  
 from transferee,** §4-46-302.

**Reimbursement of partner for  
 payments made,** §4-46-401.

**Relations among partners.**

Law governing, §§4-46-103, 4-46-106.

**Repeal of chapter.**

Partnerships subject to, §4-46-107.

**Rights of partners,** §4-46-401.

Information, §4-46-403.

**Savings clause,** §4-46-1206.

**PARTNERSHIPS —Cont'd**

**Standards of partners' conduct,**  
§4-46-404.

**Statement of denial,** §4-46-304.

**Statement of dissociation,** §4-46-704.

**Statement of dissolution,** §4-46-805.

**Statement of partnership authority,**  
§4-46-303.

**Title of act,** §4-46-1202.

**Transacting business with  
partnership,** §4-46-404.

**Transferable interest of partner.**

Charging order, subject to, §4-46-504.

Profits and losses, §4-46-502.

Transfer, §4-46-503.

**Transfer of partnership property,**  
§4-46-302.

Partner has no interest subject to  
transfer, §4-46-501.

**Uniformity of application,** §4-46-1201.

**Withdrawal of partner.**

Dissociation from partnership.

Events causing, §4-46-601.

**Wrongful act or omission by partner.**

Liability of partners, §4-46-305.

**PASSWORDS.**

**Consumer protection against  
computer spyware act,**  
§§4-111-101 to 4-111-105.

Personally identifiable information  
defined, §4-111-102.

**Personal information protection act,**  
§§4-110-101 to 4-110-108.

**PAY PER CALL.**

**Advertising,** §4-98-104.

**Citation of chapter,** §4-98-101.

**Consumer remedies,** §4-98-105.

**Definitions,** §4-98-102.

**Information and disclosure message,**  
§4-98-103.

**PERFORMING ARTS SOCIETIES.**

**Copyright royalty collection  
practices act,** §§4-76-101 to  
4-76-108.

**PERSONAL IDENTIFYING  
INFORMATION.**

**Consumer protection against  
computer spyware act,**  
§§4-111-101 to 4-111-105.

Personally identifiable information  
defined, §4-111-102.

**Defined,** §4-111-102.

**Personal information protection act,**  
§§4-110-101 to 4-110-108.

Action by attorney general.

Violation punishable by, §4-110-108.

**PERSONAL IDENTIFYING  
INFORMATION —Cont'd**

**Personal information protection act  
—Cont'd**

Breach of security system.

Duty to disclose.

Person or business acquiring,  
owning, licensing or  
maintaining data including  
personal information,  
§4-110-105.

Definitions, §4-110-103.

Destruction of records containing  
personal information.

Duty of person or business, methods,  
§4-110-104.

Exemptions from provision of chapter,  
§4-110-106.

Findings, intent and purpose of  
general assembly, §4-110-102.

Notification of breach of security  
system, §4-110-105.

Security procedures and practices.

Duty of person or business  
acquiring, owning or licensing  
personal information,  
§4-110-104.

Short title, §4-110-104.

State or federal law providing greater  
protection.

Exemption of person or business  
regulated by, §4-110-106.

Waiver of provision of chapter.

Void, unenforceable, contrary to  
public policy, §4-110-107.

**PERSONAL PROPERTY.**

**Limited partnerships.**

Transferable interests.

Status as personal property,  
§4-47-701.

**PETITIONS.**

**Limited partnerships.**

Order for signature or unsigned filing  
of document, §4-47-205.

**PET LEMON LAW,** §4-97-105.

**PETROLEUM PRODUCTS TANKS.**

**Petroleum products franchises.**  
General provisions, §§4-72-401 to  
4-72-503.

**PETS.**

**Definitions.**

Retail pet stores, §4-97-103.

**Lemon law,** §4-97-105.

**Retail pet stores,** §§4-97-101 to  
4-97-109.

Animal identification number,  
§4-97-105.

**PETS —Cont'd****Retail pet stores —Cont'd**

Applicability of act.

Liberal construction, §4-97-109.

Certification requirements, §4-97-105.

Citation of title, §4-97-101.

Consumer guarantees, §4-97-105.

“Consumer” defined, §4-97-103.

Contract requirements, §4-97-105.

Definitions, §4-97-103.

Enforcement of act, §4-97-106.

Euthanasia.

Defined, §4-97-103.

Lawful disposition of animals,  
§4-97-107.

Inspection of premises and records,  
§4-97-108.

Legislative intent, §4-97-102.

Liberal construction of act,  
§4-97-109.

Lemon law, §4-97-105.

Medical fitness of animal, §4-97-105.

Notice requirements.

Complaints regarding treatment or  
care of animals, §4-97-108.

Public policy declaration, §4-97-102.

Liberal construction of act,  
§4-97-109.

Recordkeeping requirements,  
§4-97-108.

“Records” defined, §4-97-103.

Registration.

Fee, §4-97-104. \*

Generally, §4-97-104.

Required, §4-97-104.

Reimbursement for veterinary  
services, §4-97-105.

Rulemaking authority, §4-97-106.

Title of act, §4-97-101.

Unlawful disposition of animals,  
§4-97-107.

**PHARMACISTS AND PHARMACIES.**

**Fair disclosure of state funded  
payments for pharmacists’  
services act, §§4-88-801 to  
4-88-804.**

Definitions, §4-88-802.

Itemizations required, §4-88-803.

Title of act, §4-88-801.

Violations as unfair trade practices,  
§4-88-804.

**State funded payments for  
pharmacists’ services.**

Fair disclosure, §§4-88-801 to  
4-88-804.

**PHISHING.**

**Consumer protection against  
computer spyware act,  
§§4-111-101 to 4-111-105.**

**Defined, §4-111-102.**

**PHONE CHECKS.**

**Telemarketers submitting check for  
payment.**

Express consent of consumer required,  
§4-99-203.

**PHYSICAL FITNESS CENTERS.****Health spas.**

Consumer protection, §§4-94-101 to  
4-94-109.

**PHYSICIANS AND SURGEONS.****Prescription drugs.**

Distribution drug samples,  
§§4-117-101, 4-117-102.

**PIN.**

**Consumer protection against  
computer spyware act,  
§§4-111-101 to 4-111-105.**

Personally identifiable information  
defined, §4-111-102.

**Personal information protection act,  
§§4-110-101 to 4-110-108.**

**PLEADINGS.****Limited partnerships.**

Derivative actions, §4-47-1004.

**PONZI SCHEMES.**

**Deceptive trade practices, §4-88-109.**

**POWER OF ATTORNEY.****Limited partnerships.**

Signing of records, §4-47-204.

**PREEMPTION.**

**Price gouging during emergencies,  
§4-88-305.**

**PREPAID GIFT CARDS.**

**Fair gift card act, §§4-88-701 to  
4-88-706.**

**PRESCRIPTION DRUGS.****Drug samples.**

Distribution, §§4-117-101, 4-117-102.

**Physicians and surgeons.**

Drug samples, distribution of,  
§4-117-102.

**PRESUMPTIONS.****Assumed names.**

Business under assumed name.

Certificate setting forth name.

Evidentiary effect, §4-70-205.

**Lemon law.**

Reasonable attempts to repair,  
§4-90-410.

**PRESUMPTIONS —Cont'd****Monopolies and restraint of trade.**

- Automobile dealer's anti-coercion act.
- Exclusive financing agreements.
- Threats presumed made at direction of manufacturer or distributor, §4-75-410.

**PRICE GOUGING IN**

**EMERGENCIES**, §§4-88-301 to 4-88-305.

**Definitions**, §4-88-302.

**Penalties, remedies and enforcement**, §4-88-304.

**Preemption**, §4-88-305.

**Prohibited practices**, §4-88-303.

**Taking unfair advantage of consumers**, §4-88-301.

**PRINTS.****Definitions.**

- Sales of fine prints, §4-73-301.

**Sales of fine prints.**

- Applicability of provisions, §4-73-302.
- Certificate of information.
- Furnishing to purchaser, §4-73-304.
- Information required on certificate, §4-73-305.
- Definitions, §4-73-301.
- Liability of seller for violations, §4-73-303.
- Violations of provisions.
- Liability of seller, §4-73-303.

**PRIORITIES.****Limited partnerships.**

- Disposition of assets at dissolution, §4-47-812.

**PRIVITY.****Consumer protection.**

- Warranties.
- Breach of warranty, §4-86-101.

**Products liability**, §4-86-102.

**PRIZES.****Advertising.**

- Bank night or buck night.
- Certain kinds of advertising made lawful, §4-70-102.

**Promotion, regulation**, §§4-102-101 to 4-102-109.

- Award of prize required, §4-102-107.
- Definitions, §4-102-102.
- Disclosures, §4-102-106.
- Exempted entities, §4-102-104.
- Home solicitation act applicability, §4-102-109.
- Inapplicability of provisions, §4-102-104.

**PRIZES —Cont'd****Promotion, regulation —Cont'd**

- Legislative findings and intent, §4-102-101.
- Sponsors, prohibited practices, §4-102-105.
- Telephonic communications, §4-102-108.
- Violations, §4-102-103.

**Telephone offer of prize to consumer.**

- Dispatching courier to consumer's home to collect fees or costs prohibited, §4-99-202.

**PRODUCTS LIABILITY**, §4-86-102.

**Consumer protection**, §4-86-102.

**Privity**, §4-86-102.

**PROMISSORY NOTES.****Attorneys' fees.**

- Allowable provision in promissory note for attorneys' fees, §4-56-101.

**PROMOTIONAL SOLICITATION SALES.**

**General provisions**, §§4-95-101 to 4-95-108.

**PROSECUTING ATTORNEYS.****Going out of business sales.**

- Enforcement of chapter, §4-74-104.

**Home solicitation sales.**

- Enforcement of provisions, §4-89-106.

**PUBLIC FUNDS.**

**Elder and disabled victims fund**, §4-88-207.

**Spyware monitoring fund.**

- Consumer protection against computer spyware act.
- Fines and penalties paid into, use of fund, §4-111-105.

**PUNITIVE DAMAGES.**

**Automobile dealer's anti-coercion act**, §4-75-412.

**News furnishing.**

- Discrimination in rates or service, §4-75-503.

**Unfair trade practices**, §4-75-211.

**PUPPY LEMON LAW**, §4-97-105.

**PYRAMID SCHEMES.**

**Deceptive trade practices**, §4-88-109.

**R****RABIES.****Retail pet stores.**

- General provisions, §§4-97-101 to 4-97-109.

**RAILROADS.****Freight.**

- Freight and parcel delivery services.
- Interest on deposits for, §4-86-104.

**Interest.**

- Freight and parcel delivery services.
- Interest on deposits, §4-86-104.

**REAL ESTATE BROKERS AND SALESPERSONS.****Products liability, exclusion,**  
§4-86-102.**REAL PROPERTY.****Statute of frauds.**

- Leases, estates, etc., to be in writing, §4-59-102.
- Sale of land, §4-59-101.

**REBATES.****Monopolies and restraint of trade.**

- Unfair practices.
- Secret payment prohibited, §4-75-208.
- Special rebates prohibited, §4-75-207.

**RECEIPTS.****Warehouse receipts.**

- General provisions, §§4-59-401 to 4-59-406.

**RECEIVERS.****Limited partnerships.**

- Transferable interests.
- Creditor's rights, §4-47-703.

**RECORDATION OF DOCUMENTS.****Partnerships.**

- Statements, §4-46-105.

**RECORDS.****Limited partnerships.**

- Correcting of filed records, §4-47-207.
- Delivery to and filing by secretary of state, §4-47-204.
- General partners.
- Right to information, §4-47-407.
- Information to be kept at designated office, §4-47-111.
- Liability for false information, §4-47-208.
- Limited partners.
- Right to inspect and request information, §4-47-304.
- Signing of records, §§4-47-204, 4-47-205.

**Partnerships.**

- Rights and duties as to books and records, §4-46-403.

**Service contracts.**

- Recordkeeping by provider, §4-114-108.

**RECORDS —Cont'd****Trademarks,** §4-71-208.**REFUND ANTICIPATION LOANS,**  
§§4-116-101 to 4-116-108.**Applicability of provisions,**  
§4-116-103.**Application disclosures,** §4-116-105.**Consumer remedies,** §4-116-108.**Definitions,** §4-116-102.**Fee schedules and disclosures to be posted,** §4-116-104.**Oral disclosures,** §4-116-106.**Penalties for violations,** §4-116-108.**Prohibited acts,** §§4-116-103, 4-116-107.**Title of act,** §4-116-101.**REFUNDS.****Lemon law,** §4-90-407.**REGISTRATION.****Connect Arkansas broadband program.**

- Registration of service providers, §4-113-105.

**Health spas,** §4-94-106.**Pets.**

- Retail pet stores.
- Generally, §4-97-104.

**Service contracts.**

- Registration of providers, §4-114-104.

**Telephonic sellers,** §4-99-104.

- Exemption, §4-99-106.
- Information required to be filed, §4-99-105.

- Exemption information, §4-99-106.

- Soliciting prospective purchaser on behalf of unregistered seller, §4-99-110.

**REMEDIES.****Consumer credit.**

- Equal consumer credit act.
- General provisions, §§4-87-101 to 4-87-105.

**Franchises.**

- Franchisee's remedies, §4-72-208.
- Misleading and fraudulent schemes.
- Violation of provisions.
- Recovery available, §4-72-208.
- Petroleum products franchises.
- Dealer-supplier or distributor franchises.
- Cancellation, termination or refusal to renew, §4-72-503.
- Supplier-distributor franchises.
- Cancellation, termination or refusal to renew, §4-72-403.

**Milk and milk products.**

- Unfair trade practices, §4-75-809.

## **RENTAL-PURCHASE AGREEMENTS.**

**Advertising**, §4-92-107.

### **Agreements.**

Nature, §4-92-104.

Prohibited provisions, §4-92-105.

Reinstatement, §4-92-106.

Required provisions, §4-92-105.

**Citation of chapter**, §4-92-101.

### **Damages.**

Liability of lessor, §4-92-103.

**Definitions**, §4-92-102.

### **Liability.**

Lessor, §4-92-103.

**Title of chapter**, §4-92-101.

## **RENTAL VEHICLES.**

**Prohibited transfers**, §4-100-103.

Definitions, §4-100-101.

Violations, §4-100-102.

## **REPAIRS.**

**Aftermarket crash parts**, §§4-90-301 to 4-90-307.

Defined, §4-90-302.

Installer.

Defined, §4-90-302.

Insurance requirements, §4-90-307.

Insurer.

Defined, §4-90-302.

Legislative intent, §4-90-301.

Nonoriginal equipment manufacturer  
aftermarket crash part.

Defined, §4-90-302.

Penalties, §4-90-303.

Repair estimates, §4-90-305.

Repair facility.

Defined, §4-90-302.

Required identification, §4-90-304.

Warranty repairs, §4-90-306.

**Estimates**, §4-90-305.

### **Lemon law.**

Documentation, §4-90-411.

Extension of time to repair.

War, invasion, strike, etc., §4-90-410.

Presumption of reasonable attempts to  
repair, §4-90-410.

Refusal to make, §4-90-411.

Required warranty repairs, §4-90-405.

Failure to make, §4-90-406.

**Odometer regulations**, §§4-90-201 to  
4-90-207.

**Repair estimates**, §4-90-305.

## **REPORTS.**

### **Collection agencies.**

Credit reporting disclosures.

General provisions, §§4-93-101 to  
4-93-104.

### **Consumer credit.**

Credit reporting disclosures.

General provisions, §§4-93-101 to  
4-93-104.

Credit report security freezes,  
§§4-112-101 to 4-112-114.

### **Credit reporting disclosures.**

General provisions, §§4-93-101 to  
4-93-104.

**Credit report security freezes**,  
§§4-112-101 to 4-112-114.

### **Limited liability partnerships.**

Annual report.

Required, filing, §4-46-1003.

### **Limited partnerships.**

Annual report to secretary of state,  
§4-47-210.

### **Pets.**

Retail pet stores.

Reporting requirements, §4-97-104.

## **RESTAURANTS.**

### **Franchises.**

Procedural fairness.

Applicability of provisions,  
§4-72-603.

Commencement of civil action or  
arbitration proceeding,  
§4-72-602.

Definitions, §4-72-601.

## **RESTITUTION.**

### **Checks.**

Insufficient funds, §§4-60-101 to  
4-60-103.

### **Monopolies and restraint of trade.**

Actions by attorney general, §4-75-315.

Unfair practices, §4-75-212.

### **Service contracts.**

Enforcement of provisions, §4-114-111.

**RETAIL PET STORES**, §§4-97-101 to  
4-97-109.

## **RICE.**

### **Security interest in farm products.**

Failure to disclose person with,  
§4-56-102.

## **ROYALTIES.**

### **Copyright royalty collection**

**practices act**, §§4-76-101 to  
4-76-108.

## S

**SALES.****Agents.**

Sales representatives.

General provisions, §§4-70-301 to 4-70-306.

**Cigarettes and tobacco products.**

Licenses, §4-75-707.

Unfair cigarette sales, §§4-75-701 to 4-75-714.

**Consumer protection.**

Warranties.

Breach of warranty.

Liability, §4-86-101.

**Door-to-door sales.**

General provisions, §§4-89-101 to 4-89-110.

**Franchises.**

Definition of sale, §4-72-202.

Notice, §4-72-205.

**Going out of business sales,**

§§4-74-101 to 4-74-111.

**Home solicitation sales, §§4-89-101 to 4-89-110.****Lemon law.**

Resale of returned nonconforming vehicle, §4-90-412.

**Mail and telephone solicitation sales, §§4-95-101 to 4-95-108.****Monopolies and restraint of trade.**

Unfair cigarette sales, §§4-75-701 to 4-75-714. \*

Unfair practices.

Sale at less than cost or with intent to injure competitors, §4-75-209.

**Motor vehicles.**

Arbitration and forum selection clauses in contracts, §4-75-413.

**Representatives.**

General provisions, §§4-70-301 to 4-70-306.

**Statute of frauds.**

Real property.

Contracts for sale of land, §4-59-101.

**Telephone solicitation sales, §§4-95-101 to 4-95-108.****SALES REPRESENTATIVES,**

§§4-70-301 to 4-70-306.

**Attorneys' fees.**

Noncompliance with provisions relating to payment of commission, §4-70-306.

**SALES REPRESENTATIVES —Cont'd Compensation.**

Attorneys' fees and costs.

Noncompliance with provisions relating to payment of commission, §4-70-306.

Commission.

Defined, §4-70-301.

Damages.

Noncompliance with provisions relating to payment of commission, §4-70-306.

Payment in absence of contract.

Time limitation, §4-70-303.

Damages, attorneys' fees and costs.

Failure to pay within time allowed, §4-70-306.

**Contracts, §4-70-302.**

Payment in absence of contract.

Time limitation, §4-70-303.

Damages, attorney's fees and costs.

Failure to pay commission within time allowed, §4-70-306.

Waiver of provisions of subchapter.

Prohibited, §4-70-305.

**Costs.**

Noncompliance with provisions relating to payment of commission, §4-70-306.

**Damages.**

Noncompliance with provisions relating to payment of commission, §4-70-306.

**Definitions, §4-70-301.****Jurisdiction.**

Jurisdiction over principal, §4-70-304.

**Principal.**

Defined, §4-70-301.

Jurisdiction over, §4-70-304.

**Venue.**

Contractual provisions, §4-70-302.

**Waiver.**

Provisions of subchapter.

Prohibited, §4-70-304.

**SAMPLES.****Drug samples, distribution of, §4-117-102.****SCHOOL CALENDARS.****Disclosures by solicitors for**

**advertisements on, §§4-88-501 to 4-88-503.**

Definitions, §4-88-501.

**SCHOOL CALENDARS** —Cont'd  
**Disclosures by solicitors for advertisements on** —Cont'd

Penalties, §4-88-503.  
 Violations, §4-88-502.

**SCHOOLS AND EDUCATION.**

**School calendars.**

Disclosures by solicitors for advertisements on, §§4-88-501 to 4-88-503.

Definitions, §4-88-501.

Penalties, §4-88-503.

Violations, §4-88-502.

**SECRETARY OF STATE.**

**Limited partnerships.**

Administrative dissolution, §4-47-809.

Reinstatement following, §4-47-810.

Appeal of denial, §4-47-811.

Annual report to secretary of state, §4-47-210.

Foreign limited partnerships.

Action to restrain transacting of business, §4-47-908.

Certificate of authority, §4-47-904.

Notice of revocation, §4-47-906.

Records, delivery to and filing by secretary of state, §4-47-204.

**SECURED TRANSACTIONS.**

**Criminal law and procedure.**

Security interest in certain farm products.

Meaning of terms used, §4-56-102.

Unlawful acts relating to, §4-56-102.

**SECURITIES.**

**Franchises.**

Restrictions imposed by franchisor.

Unlawful practices, §4-72-206.

**SECURITY CODE.**

**Personal information protection act,**

§§4-110-101 to 4-110-108.

**SENIOR CITIZENS.**

**Deceptive trade practices, enhanced penalties for targeting elderly persons.**

Cause of action, §4-88-204.

Civil penalties, §4-88-202.

Determination, §4-88-203.

Definitions, §4-88-201.

Disposition of funds.

Obtained from civil penalties, §4-88-202.

Education incentive, §4-88-205.

Elder and disabled victims' fund.

Created, §4-88-207.

Referrals for abuse, neglect and exploitation, §4-88-206.

**SERVICE CONTRACTS, §§4-114-101 to 4-114-112.**

**Administration of contracts.**

Appointment of administrator, §4-114-104.

Contract to identify administrator, §4-114-106.

Recordkeeping, §4-114-108.

**Cancellation of reimbursement insurance policies, §4-114-109.**

**Contents of contract, §4-114-106.**

**Covered service not provided within certain time.**

Direct application to reimbursement insurance company, §4-114-105.

**Definitions, §4-114-103.**

**Disclosures.**

Reimbursement insurance policies, §4-114-105.

Service contracts generally, §4-114-106.

**Enforcement of provisions, §4-114-111.**

**Exclusions from provisions, §4-114-102.**

**Fees.**

Registration of providers, §4-114-104.

**Insurance requirements, §4-114-104.**

**Motor vehicles.**

Citation of subchapter, §4-90-501.

Definitions, §4-90-502.

Affiliate, §4-90-503.

Disclosures required, §4-90-505.

Enforcement of provisions, §4-90-509.

Exclusive governance of provisions, §4-90-503.

Form of contracts, §4-90-511.

Incidental benefits, §4-90-507.

Investigations, §4-90-509.

Mandatory insurance, §4-90-504.

Refunds, §4-90-506.

Rulemaking authority, §4-90-508.

Termination, §4-90-506.

Unfair trade practices, §4-90-510.

**Prerequisites, §4-114-104.**

**Prior approval of work to be done.**

Contract to state procedures, §4-114-106.

**Prohibited acts, §4-114-107.**

**Purpose of provisions, §4-114-102.**

**Recordkeeping by provider, §4-114-108.**

**Registration of providers, §4-114-104.**

**Reimbursement insurance policies.**

Cancellation, §4-114-109.

Disclosures, §4-114-105.

Obligations of insurers, §4-114-110.

**SERVICE CONTRACTS —Cont'd**  
**Reserve requirements for providers,**  
 §4-114-104.

**Rules promulgation,** §4-114-112.

**Scope of provisions,** §4-114-102.

**Surety bond of provider,** §4-114-104.

**Title of provisions,** §4-114-101.

**SERVICE OF NOTICE, PROCESS  
 AND OTHER PAPERS.**

**Health-related discount cards not  
 insurance.**

Sellers to designate and register agent  
 for service of process, §4-106-203.

**Limited partnerships.**

Administrative dissolution.

Appeal of denial of reinstatement,  
 §4-47-811.

Change of office and agent for service,  
 §4-47-115.

Conversion and merger.

Foreign organization that is  
 converted.

Consent to jurisdiction,  
 §4-47-1105.

Foreign organization that is survivor  
 of merger.

Consent to jurisdiction,  
 §4-47-1109.

Designation of office and agent for  
 service, §4-47-114.

**Monopolies and restraint of trade.**

Discrimination.

Price of manufactured products, coal  
 oil or dressed beef.

Actions for recovery of forfeitures,  
 §4-75-501.

**Telephonic sellers,** §4-99-109.

**Trademark actions,** §4-71-215.

**SETOFFS AND RECOUPMENT.**

**Limited partnerships.**

Distributions.

Offsets for amounts owed to  
 partnership, §4-47-507.

**SHERIFFS.**

**Going out of business sales.**

Enforcement of chapter, §4-74-104.

**SIGNATURES.**

**Limited partnerships.**

Records filed with secretary,  
 §§4-47-204, 4-47-205.

**Statute of frauds,** §4-59-101.

**SLAMMING IN**

**TELECOMMUNICATIONS**

**INDUSTRY,** §§4-88-401 to 4-88-403.

**Definitions,** §4-88-401.

**SLAMMING IN**

**TELECOMMUNICATIONS**

**INDUSTRY —Cont'd**

**Penalties, remedies and  
 enforcement,** §4-88-403.

**Prohibited,** §4-88-402.

**Unfair or deceptive act or practice,**  
 §4-88-403.

**SOCIAL SECURITY.**

**Numbers.**

Consumer protection against computer  
 spyware act, §§4-111-101 to  
 4-111-105.

Personally identifiable information  
 defined, §4-111-102.

Misappropriation, prohibited acts,  
 §4-86-107.

Personal information protection act,  
 §§4-110-101 to 4-110-108.

**SOCIAL SECURITY NUMBERS.**

**Consumer protection against**

**computer spyware act,**

§§4-111-101 to 4-111-105.

Personally identifiable information  
 defined, §4-111-102.

**Misappropriation, prohibited acts,**  
 §4-86-107.

**Personal information protection act,**  
 §§4-110-101 to 4-110-108.

**SOLICITATION.**

**Credit cards.**

Solicitation on college campus,  
 §§4-104-201 to 4-104-204.

**Financial transaction cards.**

Solicitation of merchant to remit  
 record of sale not made by the  
 merchant, §4-59-503.

**Home solicitation sales,** §§4-89-101 to  
 4-89-110.

**Mail and telephone solicitation  
 sales,** §§4-95-101 to 4-95-108.

**SOYBEANS.**

**Security interest in farm products.**

Failure to disclose person with,  
 §4-56-102.

**SPAM E-MAIL,** §§4-88-601 to 4-88-607.

**Authority of providers,** §4-88-604.

**Blocking receipt.**

Authority of providers, §4-88-604.

**Civil action.**

Damages, costs and attorneys' fees,  
 defense, §4-88-606.

**Criminal penalty,** §4-88-605.

**Definitions,** §4-88-602.

**Enforcement of provisions,** §4-88-607.

**SPAM E-MAIL —Cont'd**

**Notice by recipient not to send future communications,**  
§4-88-603.

**Preexisting business or personal relationship with recipient.**

Commercial mail not unsolicited,  
§4-88-603.

**Requirements for sending,** §4-88-603.

**Short title,** §4-88-601.

**SPAS.****Health spas.**

Consumer protection, §§4-94-101 to 4-94-109.

**SPECIFIC PERFORMANCE.****Franchises.**

Petroleum products franchises.  
Dealer-supplier or distributor franchises.  
Cancellation, termination or refusal to renew, §4-72-503.  
Supplier-distributor franchises.  
Cancellation, termination or refusal to renew, §4-72-403.

**SPYWARE.**

**Consumer protection against computer spyware act,**  
§§4-111-101 to 4-111-105.

**STATE DEPARTMENTS AND AGENCIES.****Electronic records.**

Personal information protection act,  
§§4-110-101 to 4-110-108.

**Personal information protection act.**

Electronic records, §§4-110-101 to 4-110-108.

**STATE INSTITUTIONS.****Milk and milk products.**

Unfair trade practices.  
Exceptions, §4-75-803.

**STATUTE OF FRAUDS.****Bankruptcy and insolvency.**

Promises to pay debt discharged in bankruptcy.  
Writing required, §4-59-101.

**Confidences.**

Declarations, creations or assignments.  
Writing required, §4-59-103.

**Contracts.**

Promise to pay debt contracted during infancy.  
Writing required, §4-59-101.

**Debts.**

Promise to answer for debt of another.  
Writing required, §4-59-101.

**STATUTE OF FRAUDS —Cont'd****Debts —Cont'd**

Promise to pay debt contracted during infancy.

Writing required, §4-59-101.

**Definitions,** §4-59-101.**Estates.**

Assignment.  
Compliance of statute required,  
§4-59-102.  
Violation of statute.  
Effect, §4-59-102.

**Executors and administrators.**

Contracts charging representative personally, §4-59-101.

**Landlord and tenant.**

Leases, estates, etc., §4-59-102.

**Leases.**

Assignment.  
Compliance of statute required,  
§4-59-102.  
Violation of statute.  
Effect, §4-59-102.  
Writing required, §4-59-101.

**Marriage.**

Charges upon agreements made in consideration of marriage,  
§4-59-101.

**Minors.**

Promise to pay debt contracted during infancy.  
Writing required, §4-59-101.

**Real property.**

Leases, estates, etc., to be in writing,  
§4-59-102.  
Sale of land, §4-59-101.

**Sales.**

Real property.  
Contracts for sale of land, §4-59-101.

**Signatures,** §4-59-101.**Time.**

Performance within one year,  
§4-59-101.

**Trusts and trustees.**

Declaration, creations or assignments.  
Writing required, §4-59-103.

**STATUTE OF LIMITATIONS.****Consumer protection,** §4-88-115.**Franchises.**

Petroleum products franchises.  
Dealer-supplier or distributor franchises.  
Cancellation, termination or refusal to renew, §4-72-503.  
Supplier-distributor franchises.  
Cancellation, termination or refusal to renew, §4-72-403.

**STATUTE OF LIMITATIONS —Cont'd****Fraudulent conveyances**, §4-59-209.**Health-related discount cards not insurance.**

Action for violation, §4-106-202.

**Lemon law.**

Actions, §4-90-416.

**Limited partnerships.**

Dissolution, claims not known at time of, §4-47-807.

Improper distributions, §4-47-509.

**Monopolies and restraint of trade.**

Actions by attorney general, §4-75-320.

Unfair practices, §4-75-217.

**Odometer tampering**, §4-90-207.**Pay per call.**

Consumer actions, §4-98-105.

**Trade secrets.**

Misappropriation, §4-75-603.

**STATUTES.****Frauds**, §§4-59-101 to 4-59-103.**SWEEPSTAKES.****Mail and telephone solicitation**

sales, §§4-95-101 to 4-95-108.

**Prize promotion generally**,

§§4-102-101 to 4-102-109.

**T****TAMPERING.****Odometers**, §4-90-204.**TAXATION.****Refunds.**

Anticipation loans, §§4-116-101 to 4-116-108.

**TELECOMMUNICATIONS.****Advertising.**

Pay per call, §4-98-104.

**Caller identification service.**

Deceptive trade practices.

Defined, §4-88-102.

Fictitious or misleading names or telephone numbers.

Displaying resident's service, §4-88-107.

Telephone sellers.

Blocking by, §§4-99-301 to 4-99-303.

Defined, §4-99-103.

Fictitious or misleading name or telephone number.

Displaying, §§4-99-103, 4-99-201.

**Consumer protection.**

Pay per call, §§4-98-101 to 4-98-105.

**Definitions.**

Pay per call, §4-98-102.

**TELECOMMUNICATIONS —Cont'd****No call lists.**

Consumer telephone privacy act, §§4-99-401 to 4-99-408.

**Pay per call.**

Advertisement requirements, §4-98-104.

Citation of chapter, §4-98-101.

Consumer remedies, §4-98-105.

Definitions, §4-98-102.

Information and disclosure message, §4-98-103.

**Slamming in telecommunications industry**, §§4-88-401 to 4-88-403.

Definitions, §4-88-401.

Penalties, remedies and enforcement, §4-88-403.

Prohibited, §4-88-402.

Unfair or deceptive act or practice, §4-88-403.

**TELEMARKETING.****Attorney general.**

Agent for service, §4-99-109.

Enforcement of chapter, §4-99-111.

**Bonds, surety**, §4-99-107.**Caller identification.**

Blocking by telephonic sellers, §§4-99-301 to 4-99-303.

Definitions, §4-99-301.

Penalties and remedies, §4-99-303.

Prohibition, §4-99-302.

Unfair or deceptive or practice, §4-99-303.

Defined, §4-99-103.

Fictitious or misleading name or telephone number.

Displaying, §§4-99-103, 4-99-201.

**Check, draft or negotiable instrument.**

Submitting for payment drawn on consumer's account.

Express consent of consumer required, §4-99-203.

**Collection practices**, §4-99-202.**Construction and interpretation**, §4-99-102.**Deceptive trade practices**, §4-99-111.**Definitions**, §4-99-103.**Findings of legislature**, §4-99-101.**Gifts, prizes and awards.**

Prospective purchasers.

Information to be provided, §4-99-108.

**Identification of caller**, §4-99-201.**Intent of legislature**, §4-99-101.**Legislative declaration**, §4-99-101.**Mail and telephone solicitation sales**, §§4-95-101 to 4-95-108.

Citation of act, §4-95-101.

**TELEMARKETING —Cont'd****Mail and telephone solicitation sales —Cont'd**

- Civil penalties, §4-95-104.
- Criminal penalties, §4-95-103.
- Definitions, §4-95-102.
- Exemptions from act, §4-95-107.
- Identification of caller, §4-99-201.
- Inapplicability of act, §4-95-107.
- Offers of gifts and prizes.
  - "Gift or prize" defined, §4-95-102.
  - Unlawful practices, §4-95-105.
- Purchase agreements.
  - Generally, §4-95-106.
  - Waiver or attempt to waive provisions.
    - Voidness and unenforceability of act, §4-95-108.
- Title of act, §4-95-101.
- Unlawful practices.
  - Civil penalties, §4-95-104.
  - Criminal penalties, §4-95-103.
  - Offers of gifts or prizes, §4-95-105.
  - "Gift or prize" defined, §4-95-102.

**No call lists, §§4-99-401 to 4-99-408.**

- Applicability of provision, §4-99-406.
- Arkansas consumer telephone privacy act.
  - Short title, §4-99-401.
- Deceptive trade practice.
  - Violations, §4-99-407.
- Definition, §4-99-403.
- Enforcement, §4-99-407.
- Findings, §4-99-402.
- Intent, §4-99-402.
- Persons exempt, §4-99-406.
- Short title.
  - Arkansas consumer telephone privacy act, §4-99-401.
- Statewide database.
  - Attorney general to establish, §4-99-404.
  - Calling number included in database, prohibition, §4-99-405.
  - Calling number without first accessing database, §4-99-405.
  - Listing charge, §§4-99-404, 4-99-408.

**Prize promotion, §4-102-108.****Promotional offering, §4-99-107.****Prospective purchasers.**

- Gifts, prizes, awards.
  - Information to be provided, §4-99-108.
- Soliciting on behalf of unregistered seller, §4-99-110.

**Registration, §4-99-104.**

- Exemption, §4-99-106.

**TELEMARKETING —Cont'd****Registration —Cont'd**

- Information required to be filed, §4-99-105.
- Exemption information, §4-99-106.
- Soliciting prospective purchaser on behalf of unregistered seller, §4-99-110.

**Remedies for violations, §4-99-111.****Service of process, §4-99-109.****Unfair competition and deceptive trade practices, §4-99-111.****TELEPHONE CHECKS.****Telemarketers submitting check for payment.**

- Express consent of consumer required, §4-99-203.

**THIRD PARTIES.****Credit report security freezes.**

- Third party request for access while in place, §4-112-105.

**THREATS.****Monopolies and restraint of trade.**

- Automobile dealer's anti-coercion act.
  - Exclusive financing agreements, §§4-75-409, 4-75-410.

**TICKETS.****Internet sales, restrictions, §4-70-103.****TIME.****Limited liability partnerships.**

- Annual report.
  - Filing, §4-46-1003.

**Statute of frauds.**

- Performance within one year, §4-59-101.

**TIME SHARES.****Mail and telephone solicitation sales, §§4-95-101 to 4-95-108.****Telephone solicitation sales, §§4-95-101 to 4-95-108.****TORTS.****Products liability, §4-86-102.****TRADEMARKS.****Protection, §§4-71-201 to 4-71-218.**

- Application for registration, §§4-71-203, 4-71-204.
- Assignments, §4-71-207.
- Cancellation, §4-71-209.
- Certificate of registration, §§4-71-205, 4-71-206.
- Change of name, §4-71-207.
- Classification, §4-71-210.
- Common law rights, §4-71-216.
- Definitions, §4-71-201.

**TRADEMARKS —Cont'd****Protection —Cont'd**

- Fees, §4-71-217.
- Fraudulent registration, §4-71-211.
- Infringement, §4-71-212.
- Injury to business reputation, §4-71-213.
- Record of registered marks, §4-71-208.
- Registrability, §4-71-202.
- Remedies for violations, §4-71-214.
- Repeal of prior acts, §4-71-218.
- Venue of actions, §4-71-215.

**Registration.**

- Protection, §§4-71-201 to 4-71-218.

**TRADE SECRETS.****Attorneys' fees.**

- Award to prevailing party in action, §4-75-607.

**Confidentiality of information.**

- Actions under provisions.
- Preservation of secrecy, §4-75-605.

**Conflict of laws.**

- Effect of act on other laws, §4-75-602.

**Consumer protection.**

- Evidence held in camera, §4-88-111.

**Damages.**

- Misappropriation, §4-75-606.

**Injunctions.**

- Misappropriation, §4-75-604.

**Limitation of actions.**

- Misappropriation, §4-75-603.

**Misappropriation.**

- Attorneys' fees.
  - Award to prevailing party in actions for, §4-75-607.
- Damages, §4-75-606.
- Defined, §4-75-601.
- Injunctions, §4-75-604.
- Limitation of actions, §4-75-603.

**Preservation of secrecy.**

- Actions under provisions, §4-75-605.

**TRUSTS AND TRUSTEES.****Statute of frauds.**

- Declaration, creation or assignment.
- Writing required, §4-59-103.

**U****UNFAIR AND DECEPTIVE TRADE PRACTICES.****Burden of proof.**

- Exemption or exception from definition in chapter, §4-99-112.

**Caller identification blocking by telephonic sellers, §§4-99-301 to 4-99-303.****UNFAIR AND DECEPTIVE TRADE PRACTICES —Cont'd****Collection practices.**

- Telephone solicitations, §4-99-202.

**Credit card processing services, §4-115-102.****Credit card solicitation on college campus, §§4-104-201 to 4-104-204.****Discount cards.**

- Health-related discount cards, §§4-106-201 to 4-106-205.

**Fair disclosure of state funded payments for pharmacists' services act, §§4-88-801 to 4-88-804.****Fair gift card act, §§4-88-701 to 4-88-706.****Health-related discount cards, §§4-106-201 to 4-106-205.****Mail and telephone solicitation sales, §§4-95-101 to 4-95-108.****Milk and milk products.**

- General provisions, §§4-75-801 to 4-75-809.

**Motor vehicles.**

- Service contracts, §4-90-510.

**Notario or notario publico.**

- Advertising services using terms.
- Restrictions, §§4-109-101 to 4-109-105.

**Pay per call, §4-98-105.****Pharmacists and pharmacy.**

- Fair disclosure of state funded payments for pharmacists' services act, §§4-88-801 to 4-88-804.

**Prizes.**

- Telephone offer of prize to consumer.
- Dispatching courier to consumer's home to collect fees or costs prohibited, §4-99-202.

**School calendars.**

- Disclosures by solicitors for advertisements on, §§4-88-501 to 4-88-503.

**Slamming in telecommunications industry, §§4-88-401 to 4-88-403.****Telephone sellers, §4-99-111.**

- Caller identification blocking by telephonic sellers, §§4-99-301 to 4-99-303.
- Collection practices, §4-99-202.

**UNIFORM LAWS.****Limited partnership act, §§4-47-101 to 4-47-1302.****Partnerships.**

- Limited partnership act of 2001, §§4-47-101 to 4-47-1302.

**UNIFORM LAWS —Cont'd****Partnerships —Cont'd**

Uniform partnership act of 2006,  
§§4-46-101 to 4-46-1207.

**UNSOLICITED MERCHANDISE.**

**Generally,** §4-86-103.

**V****VENUE.****Health-related discount cards not insurance.**

Action for violation, §4-106-202.

**Monopolies and restraint of trade.**

Actions by attorney general, §4-75-319.  
Discrimination.

Price of manufactured products, coal  
oil or dressed beef.

Actions for recovery of forfeiture,  
§4-75-501.

Unfair practices.

Actions by attorney general,  
§4-75-216.

**Sales representatives.**

Contractual provisions, §4-70-302.

**Trademark actions,** §4-71-215.**VETERANS.****Gravestones.**

Inscription, §4-86-105.

**W****WAIVER.****Art.**

Consignment act.

Voidness of waiver of provisions of  
subchapter, §4-73-205.

**Health spas.**

Consumer protection.

Provisions of chapter.

Waiver void and unenforceable,  
§4-94-105.

**Personal information protection act.**

Provision of chapter.

Void, unenforceable, contrary to  
public policy, §4-110-107.

**Sales representatives.**

Provisions of subchapter.

Prohibited, §4-70-304.

**WAREHOUSE RECEIPTS.****Duplicate receipts.**

Issuance of duplicate receipts not so  
marked.

Penalty, §4-59-403.

**WAREHOUSE RECEIPTS —Cont'd****Fraud.**

Issuance of receipts containing false  
statement.

Penalty, §4-59-402.

**Liens.**

Negotiation of receipts by depositor of  
encumbered goods without  
disclosing facts.

Penalty, §4-59-406.

**Penalties.**

Delivering goods without obtaining  
negotiable receipt, §4-59-405.

Fraudulent issuance of receipt  
containing false statement,  
§4-59-402.

Issuance of duplicate receipt not so  
marked, §4-59-403.

Issuance of receipt for goods owned by  
warehousemen without statement  
of ownership, §4-59-404.

Issuance of receipts for goods not  
received or controlled, §4-59-401.

Negotiation of receipt by depositor of  
encumbered or another's goods  
without disclosing facts,  
§4-59-406.

**WAREHOUSES.****Receipts.**

General provisions, §§4-59-401 to  
4-59-406.

**WARRANTIES.**

**Assistive devices,** §§4-105-201 to  
4-105-206.

**Consumer protection.**

Breach of warranty.

Liability, §4-86-101.

Privity, §4-86-101.

**Franchises.**

Farm equipment retailer franchise  
protection, §4-72-311.

**Lemon law,** §§4-90-401 to 4-90-417.

**Motor vehicles.**

Lemon law, §§4-90-401 to 4-90-417.

**Pets,** §4-97-105.

**WHEELCHAIRS.**

**Assistive device warranty,**  
§§4-105-201 to 4-105-206.

Acceptance of return of device.

Failure to fix nonconformity in  
reasonable amount of time,  
§4-105-204.

Allowance for use, §§4-105-204,  
4-105-205.

Assistive device defined, §4-105-201.

Current value of written lease,  
§4-105-205.

**WHEELCHAIRS —Cont'd****Assistive device warranty —Cont'd**

Definitions, §4-105-201.

Device not conforming to applicable express warranty.

Procedure to correct nonconformity, §4-105-203.

Express warranties, §4-105-202.

Manufacturer deemed to have expressly warranted, §4-105-202.

Offer to manufacturer to transfer possession of device.

Required to receive comparable new device or refund, §4-105-206.

Reasonable allowance for use, §§4-105-204, 4-105-205.

Reasonable amount of time to fix nonconformity, §4-105-204.

Refund to consumer.

Failure fix nonconformity and reasonable amount of time, §§4-105-204, 4-105-206.

**WHEELCHAIRS —Cont'd****Assistive device warranty —Cont'd**

Repair of nonconformity, §4-105-203.

Reasonable amount of time defects, §4-105-204.

Replacement of device.

Failure to fix nonconformity in reasonable amount of time, §§4-105-204, 4-105-206.

Return of device.

Failure to fix nonconformity in reasonable amount of time, §4-105-204.

Valuation, §4-105-205.

**WITNESSES.****Consumer protection.**

Court order to appear, §4-88-112.

**Monopolies and restraint of trade.**

Unfair practices, §4-75-211.

**WRITINGS.**

**Statute of frauds**, §§4-59-101 to 4-59-103.



# Index to Title 4

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## A

### **ACCELERATION.**

#### **Commercial code.**

Option of acceleration at will,  
§4-1-309.

Consumer leases, §4-2A-109.

### **ACCEPTANCE.**

#### **Offer and acceptance.**

Leases, §§4-2A-205, 4-2A-206.

Sale of goods.

Formation of contract, §§4-2-205,  
4-2-206, 4-2-328.

### **ACCEPTOR.**

#### **Negotiable instruments.**

Defined, §4-3-103.

Liability on obligation, §4-3-413.

### **ACCESS CODES.**

#### **Personal information protection act,**

§§4-110-101 to 4-110-108.

### **ACCESSIONS.**

#### **Leases, UCC, §4-2A-310.**

Defined, §4-2A-103.

### **Secured transactions.**

Defined, §4-9-102.

Priority and perfection of security  
interests, §4-9-335.

### **ACCORD AND SATISFACTION.**

#### **Negotiable instruments.**

By use of instrument, §4-3-311.

### **ACTIONS.**

#### **Comparative negligence.**

Bank deposits and collections.

Unauthorized signature or  
alteration, customer's duty to  
report, §4-4-406.

Negotiable instruments.

Forged signature or alteration of  
instrument, §4-3-406.

#### **Consumer protection.**

Private cause of action by persons  
suffering damage or injury,  
§4-88-113.

#### **Contributory fault.**

Bank deposits and collections.

Unauthorized signature or  
alteration, customer's duty to  
report, §4-4-406.

### **ACTIONS —Cont'd**

#### **Contributory fault —Cont'd**

Negotiable instruments.

Forged signature or alteration of  
instrument, §4-3-406.

#### **Corporations.**

Derivative actions, §4-26-714.

Stock and stockholders.

Provisions relating to actions by  
shareholders, §4-26-714.

Shareholder's right to dissent does  
not impair other legal actions,  
§4-26-713.

#### **Credit report security freezes.**

Action for noncompliance, §4-112-112.

#### **Electronic mail.**

Unsolicited commercial and sexually  
explicit electronic mail,  
§§4-88-606, 4-88-607.

#### **Foreign investor companies,**

§4-31-204.

#### **Franchises.**

Misleading and fraudulent schemes.

Statute of limitations, §4-72-207.

Petroleum products franchises.

Dealer-supplier or distributor  
franchises.

Cancellation, termination or  
refusal to renew, §4-72-503.

Supplier-distributor franchises.

Cancellation, termination or  
refusal to renew, §4-72-403.

#### **Health-related discount cards not**

**insurance, §4-106-202.**

#### **Home solicitation sales.**

Civil actions against violators,  
§4-89-106.

#### **Interest.**

Usurious contract.

Attorneys at law.

Fees in litigation involving  
usurious transactions,  
§4-57-108.

#### **Investment securities.**

Rights of purchaser of security  
entitlement from entitlement  
holder, §4-8-510.

#### **Lemon law.**

Consumer's right to bring civil action  
to enforce provisions, §4-90-415.

**ACTIONS —Cont'd****Limited liability companies.**

Authority to sue on behalf of company,  
§4-32-1102.

Effect of lack of authority,  
§4-32-1103.

Parties to actions, §4-32-305.

Suits by and against companies,  
§4-32-1101.

**Limited liability partnerships.**

Foreign limited liability partnerships.

Action by attorney general,  
§4-46-1105.

**Limited partnerships.**

Derivative actions, §§4-47-1002 to  
4-47-1005.

Direct action by partner, §4-47-1001.

Dissolution, claims not known at time  
of.

Limitation of actions, §4-47-807.

Foreign limited partnerships.

Action to restrain transacting of  
business, §4-47-908.

General partners.

Effect of actions by and against  
partnership and partners,  
§4-47-405.

Liability for consent to improper  
distributions, §4-47-509.

Improper distributions.

Limitation of actions, §4-47-509.

Order for signature or unsigned filing  
of document, §4-47-205.

**Monopolies and restraint of trade.**

Automobile dealer's anti-coercion act.

Double damages actions of injured  
parties, §4-75-412.

By attorney general, §4-75-315.

Statute of limitations, §4-75-320.

Venue, §4-75-319.

Discrimination.

Price of manufactured products, coal  
oil or dressed beef.

Recovery of forfeitures, §4-75-501.

Interstate or foreign commerce.

Actions not barred because it affects,  
§4-75-318.

Precedence of actions brought under  
subchapter, §4-75-308.

Unfair practices.

By attorney general, §4-75-212.

Statute of limitations, §4-75-217.

Venue, §4-75-216.

Interstate or foreign commerce.

Action not barred because it  
affects, §4-75-215.

**Nonprofit corporations.**

Power to sue and be sued, §4-28-209.

**ACTIONS —Cont'd****Notes.**

Small notes, tickets or bills, §4-17-104.

**Odometer regulations.**

Civil action by private person,  
§4-90-207.

**Partnerships.**

By or against partnerships and  
partners, §4-46-307.

By partner against partnership,  
§4-46-405.

By partnership against partner,  
§4-46-405.

Liability for partner's actionable  
conduct, §4-46-305.

Liability for partnership obligations,  
§4-46-306.

Liability of purported partner,  
§4-46-308.

Wrongful dissociation, liability,  
§4-46-602.

**Restaurant franchises.**

Commencement of civil actions,  
§4-72-602.

**Service contracts.**

Enforcement of provisions, §4-114-111.

**Social security numbers.**

Misappropriation, prohibited acts,  
§4-86-107.

**Spam.**

Unsolicited commercial and sexually  
explicit electronic mail,  
§§4-88-606, 4-88-607.

**Unincorporated nonprofit  
associations, §4-28-609.**

Action not abated by change of  
members, §4-28-613.

Reimbursement or payment of  
expenses, fees and costs,  
§4-28-627.

Venue, §4-28-614.

**Unsolicited commercial and sexually  
explicit electronic mail,  
§§4-88-606, 4-88-607.****ADMISSIONS.****Limited liability companies.**

Admissions or representations by  
members and managers,  
§4-32-302.

**ADVERTISING.****Cigarettes and tobacco products.**

Unfair cigarette sales.

Sales at less than cost.

Evidentiary effect of  
advertisement for, §4-75-708.

**Consumer protection.**

"Bait and switch" advertising.

Prohibited, §4-88-107.

**ADVERTISING —Cont'd****Consumer protection —Cont'd**

Unlawful practices, §4-88-107.

**Discount cards.**

Health-related discount cards not insurance.

Prohibited acts, §4-106-201.

**Franchises.**

Unlawful practices of franchisors, §4-72-206.

**Going out of business sales.**

Licenses.

Required, §4-74-105.

**Health-related discount cards not insurance.**

Prohibited acts, §4-106-201.

**Mail and telephone solicitation sales, §§4-95-101 to 4-95-108.****Notario or notario publico.**

Advertising services using terms.

Restrictions, §§4-109-101 to 4-109-105.

**Pay per call, §4-98-104.****Prizes.**

Bank night or buck night.

Certain kinds of advertising made lawful, §4-70-102.

Promotions, regulation, §§4-102-101 to 4-102-109.

**School calendars.**

Disclosures by solicitors for advertisements on, §§4-88-501 to 4-88-503.

Definitions, §4-88-501.

Penalties, §4-88-503.

Violations, §4-88-502.

**Service of process.**

Registered agent for service.

Registration, §4-25-101.

**Telephones.**

Pay per call, §4-98-104.

**Weights and measures.**

Packages.

Advertising packages for sale, §4-18-321.

**AFTER-ACQUIRED PROPERTY.****Secured transactions.**

Security interest in, §4-9-204.

**AFTERMARKET CRASH PARTS, §§4-90-301 to 4-90-307.****Definitions, §4-90-302.****Installer.**

Defined, §4-90-302.

**Insurance requirements, §4-90-307.****Insurer.**

Defined, §4-90-302.

**Legislative intent, §4-90-301.****AFTERMARKET CRASH PARTS**

—Cont'd

**Nonoriginal equipment**

manufacturer aftermarket crash part.

Defined, §4-90-302.

**Penalties, §4-90-303.****Repair estimates, §4-90-305.****Repair facility.**

Defined, §4-90-302.

**Required identification, §4-90-304.****Warranties.**

Repairs on warranted vehicles, §4-90-306.

**AGENTS.****Health-related discount cards not insurance.**

Sellers to designate and register agent for service of process, §4-106-203.

**Limited liability companies.**

Agency power of members and managers, §4-32-301.

Dissolution of company, §4-32-904.

**Limited partnerships.**

Change of office and agent for service, §4-47-115.

Designation of office and agent for service, §4-47-114.

General partner as agent of partnership, §4-47-402.

**Model registered agents act, §§4-20-101 to 4-20-118.****Nonprofit corporations.**

Service of process.

Secretary of state as registered agent, §4-28-214.

**Nonprofit corporations (1993).**

Indemnification, §4-33-856.

**Partnerships.**

Partner deemed agent of partnership, §4-46-301.

**Registered agents, §§4-20-101 to 4-20-118.****Sales representatives.**

General provisions, §§4-70-301 to 4-70-306.

**Service of process.**

Registered agents, §§4-20-101 to 4-20-118.

**Unincorporated nonprofit associations.**

Agent for service of process, §§4-28-611, 4-28-612.

Members not considered agents, §4-28-615.

**AGRICULTURAL LIENS.****Secured transactions.**

Default, time of, §4-9-606.

**AGRICULTURAL LIENS —Cont'd****Secured transactions —Cont'd**

Defined, §4-9-102.

Generally, §§4-9-101 to 4-9-709.

Perfection and priority.

Conflicting liens, priority, §4-9-322.

Financing statement providing incorrect information, §4-9-338.

Interests which take priority over or free from agricultural lien, §4-9-317.

Law governing, §4-9-302.

Same collateral, priority, §4-9-322.

When filing required to perfect, §4-9-310.

When perfected, §4-9-308.

**AGRICULTURE.****Documents of title.**

Warehouse receipts.

Storage under government bond.

Agricultural commodities, §4-7-201.

**Fairs and associations of public nature.**

Agricultural and mechanical fair associations.

Applicability of corporations provisions, §4-28-101.

**Farm equipment retailer franchise protection, §§4-72-301 to 4-72-311.****Farm machinery.**

Hour meters on farm machinery, §§4-96-201, 4-96-202.

Alteration prohibited, §4-96-202.

Conspiracy to violate subchapter, §4-96-202.

Misdemeanors.

Violations of subchapter, §4-96-202.

Tampering prohibited, §4-96-201.

**Franchises.**

Farm equipment retailer franchise protection, §§4-72-301 to 4-72-311.

**Liens.**

Secured transactions.

Default, time of, §4-9-606.

Defined, §4-9-102.

Generally, §§4-9-101 to 4-9-709.

Perfection and priority.

Conflicting interests and agricultural liens, §4-9-322.

Filed financing statement providing certain incorrect information.

Priority of agricultural lien perfected by, §4-9-338.

Filing.

When required to perfect lien, §4-9-310.

**AGRICULTURE —Cont'd****Liens —Cont'd**

Secured transactions —Cont'd

Perfection and priority —Cont'd

Interests that take priority over or take free of agricultural lien, §4-9-317.

Law governing, §4-9-302.

Priorities among agricultural liens on same collateral, §4-9-322.

When perfected, §4-9-308.

**Monopolies and restraint of trade.**

Discrimination.

Buying milk, cream, butter, butter fat, poultry, eggs, grain or cotton seed, §4-75-502.

**Plant board.**

Quality specifications for engine fuels, petroleum products and automotive lubricants.

Administration by director, §4-108-204.

Adoption of standards and rules, §§4-108-204, 4-108-212.

State petroleum products division, §4-108-205.

**Security interest in farm products.**

Failure to disclose person with, §4-56-102.

**Storage of commodities.**

Warehouse receipts.

Storage under government bond, §4-7-201.

**Warehouse receipts.**

Crops, storage under government bond, §4-7-201.

**ALCOHOLIC BEVERAGES.****Commercial code.**

Warehouse receipts.

Storage under government bond, §4-7-201.

**Documents of title.**

Warehouse receipts.

Storage under government bond, §4-7-201.

**Sales.**

Implied warranty of merchantability, §4-2-314.

Warranty.

Implied warranty of merchantability, §4-2-314.

**Storage.**

Warehouse receipts.

Storage under government bond, §4-7-201.

**Warehouses.**

Storage under government bond, §4-7-201.

**ALCOHOLIC BEVERAGES —Cont'd**  
**Warranties.**

Implied warranty of merchantability,  
§4-2-314.

**AMUSEMENTS.**

**Tickets to live events, restrictions**  
**on Internet sales,** §4-70-103.

**ANIMALS.**

**Pet warranties,** §4-97-105.

**Retail pet stores,** §§4-97-101 to  
4-97-109.

**Unborn young.**

Sale of goods.  
Definition of "goods," §4-2-105.

**ANTICIPATORY REPUDIATION.**

**Leases under UCC,** §§4-2A-402,  
4-2A-403.

**Letters of credit.**

Remedies, §4-5-111.

**Sales under UCC,** §4-2-610.

Proof of market price, §4-2-723.

Retraction, §4-2-611.

**ANTI-TRUST ACT.****Monopolies and restraint of trade.**

General provisions, §§4-75-301 to  
4-75-320.

**APPEALS.****Consumer protection.**

Court orders for production of  
witnesses and evidence, §4-88-112.

**Corporations.**

Documents.

Refusal to file document, §4-27-126.

Secretary of state.

Appeals from decisions, §4-26-107.

**Dental corporations.**

Suspension or revocation of certificate  
of registration, §4-29-411.

Notice of appeal, §4-29-411.

**Limited partnerships.**

Reinstatement following  
administrative dissolution.

Appeal of denial, §4-47-811.

**Medical corporations.**

Suspension or revocation of  
registration certificates, §4-29-310.

Notice of appeal, §4-29-311.

**Nonprofit corporations (1993).**

Denial of reinstatement following  
administrative dissolution,  
§4-33-1423.

Filing of documents.

Secretary's of state refusal,  
§4-33-126.

Foreign corporations.

Revocation of certificate of authority,  
§4-33-1531.

**APPEALS —Cont'd****Professional corporations.**

Suspension or revocation of certificate  
of registration, §4-29-212.

**APPLES.****Bushel.**

Lawful measure, §4-18-332.

Legal weight.

Green apples and dried apples,  
§4-18-331.

**APPLIANCES.**

**Service contracts,** §§4-114-101 to  
4-114-112.

**ARBITRATION.****Lemon law.**

Informal dispute resolution, §4-90-414.

**Motor vehicle sales contracts.**

Arbitration clauses in sales contracts,  
§4-75-413.

**Restaurant franchises.**

Procedural fairness.

Commencement of arbitration  
proceeding, §4-72-602.

**ARREST.****Weights and measures.**

State plant board.

Special police powers, §4-18-313.

**ART.****Consignment act.**

Applicability of subchapter, §4-73-203.

Art dealers.

Defined, §4-73-202.

Liability, §4-73-207.

Violations.

Penalty, §4-73-204.

Artists.

Defined, §4-73-202.

Attorney's fees.

Action by artists against dealers,  
§4-73-204.

Citation of act.

Short title, §4-73-201.

Costs.

Actions by artists against dealers,  
§4-73-204.

Dealers.

Art dealers.

Defined, §4-73-202.

Definitions, §4-73-202.

Delivery of work of fine art for  
exhibition or sale.

Effect, §4-73-207.

Liens.

Exemptions.

Works of art consigned for sale  
exempt from liens, §4-73-206.

**ART —Cont'd****Consignment act —Cont'd**

On consignment.

Defined, §4-73-202.

Penalties.

Violations of act by dealers,  
§4-73-204.

Security interests.

Exemptions.

Works of art consigned for sale  
exempt from security interest  
of creditors of art dealer,  
§4-73-206.

Title of act.

Short title, §4-73-201.

Waiver of subchapter provisions void,  
§4-73-205.**Construction and interpretation.**

Consignment act.

Applicability of subchapter,  
§4-73-203.**Definitions.**

Consignment act, §4-73-202.

**Liens.**

Consignment act.

Exemption from liens.

Works of art consigned for sale,  
§4-73-206.**Penalties and forfeitures.**

Consignment act.

Violation of act by dealer, §4-73-204.

**Sales.**

Prints.

Sales of fine prints, §§4-73-301 to  
4-73-305.**Waiver.**

Consignment act.

Voidness of waiver of provisions of  
subchapter, §4-73-205.**ASSETS.****Corporations.**

Liquidation.

Jurisdiction of court to liquidate  
assets and business of  
corporation, §4-26-1108.

Mortgage of corporate assets.

Corporate borrowing, §§4-26-901,  
4-27-1201.

Generally, §§4-26-901, 4-27-1201.

Net assets.

Defined, §4-26-102.

Rights of dissenting shareholders upon  
sale or exchange of assets,  
§4-26-904.

Definitions, §4-27-1301.

Demand of payment.

Duty, §4-27-1323.

**ASSETS —Cont'd****Corporations —Cont'd**Rights of dissenting shareholders upon  
sale or exchange of assets

—Cont'd

Dissenters' notice, §4-27-1322.

Failure of corporation to take action,  
§4-27-1326.Judicial appraisal of shares,  
§4-27-1330.Court costs and counsel fees,  
§4-27-1331.Nominees and beneficial owners,  
§4-27-1303.Notice of dissenters' rights,  
§4-27-1320.Notice of intent to demand payment,  
§4-27-1321.Payments to shareholders,  
§4-27-1325.

After-acquired shares, §4-27-1327.

Dissatisfaction with payment or  
offer, §4-27-1328.

Right of dissent, §4-27-1302.

Uncertificated shares, §4-27-1324.

Sale of assets in regular course of  
business, §§4-26-902, 4-27-1201.Sale or lease other than in regular  
course of business, §§4-26-903,  
4-27-1202.

Valuation, §4-26-616.

**Nonprofit corporations.**

Dissolution.

Disposition of assets upon  
dissolution, §4-28-207.**ASSIGNMENTS.****Contracts.**Nonnegotiable instruments generally,  
§§4-58-101 to 4-58-110.

Sale of goods, §4-2-210.

**Defenses.**

Nonnegotiable instruments.

Retention of defenses, §§4-58-101,  
4-58-105.**Dental corporations.**

Certificate of registration, §4-29-409.

**Forgery.**

Nonnegotiable instruments.

Proof of assignment not required  
except on allegation of forgery,  
§4-58-109.**Franchises.**

Definition of assignments, §4-72-202.

Notice, §4-72-205.

**Leases.**

Commercial code, §4-2A-103.

**Letters of credit.**

Proceeds, §4-5-114.

**ASSIGNMENTS —Cont'd****Liens.**

- Nonnegotiable instruments.
- Vendor's lien inures to benefit of assignee, §4-58-107.

**Limited liability company interest,** §4-32-704.

- Admission of assignee as member, §4-32-801.
- Right of assignee to become member, §4-32-706.

**Medical corporations.**

- Registration.
- Certificates, §4-29-309.

**Nonnegotiable instruments.**

- Assignable, §4-58-102.
- Consideration.
- Release of consideration.
- Assignor may not release after assignment, §4-58-106.
- Unnecessary to set out, §4-58-103.
- Date of assignment.
- Assignments to bear true date, §4-58-104.
- Blank assignment, §4-58-104.
- Defenses.
- Retention, §§4-58-101, 4-58-105.
- Forgery.
- Proof of assignment required on allegation of forgery, §4-58-109.
- Good faith assignments complete at time of assignment, §4-58-105.

**Liens.**

- Vendor's lien inures to benefit of assignee, §4-58-107.
- Nonpayment or protest of instrument.
- Liability of assignors, §4-58-108.
- Actions, §4-58-108.
- Recovery by plaintiff, §4-58-110.
- Power of assignor after assignment.
- Limited, §4-58-106.
- Proof of assignment.
- Not required except on allegation of forgery, §4-58-109.
- Subsequent assignees acquire no rights, §4-58-105.
- When good faith assignment complete, §4-58-105.

**Professional corporations.**

- Certificates of registration, §4-29-210.

**Secured transactions.**

- Account debtor notified of assignment.
- Duties of secured party, §4-9-209.
- Agreement not to assert defenses against assignee, §4-9-403.
- Modification or substitution for assigned contract, §4-9-405.
- Notice of assignment, §4-9-406.

**ASSIGNMENTS —Cont'd****Secured transactions —Cont'd**

- Powers of secured party of record, §4-9-514.
- Restrictions on assignments of letter of credit rights, §4-9-409.
- Restrictions on certain assignments, §4-9-408.
- Rights of assignee, §4-9-404.
- Trademarks,** §4-71-207.

**ASSISTIVE DEVICE WARRANTIES,** §§4-105-201 to 4-105-206.**Acceptance of return of device.**

- Failure to fix nonconformity in reasonable amount of time, §4-105-204.

**Allowance for use,** §§4-105-204, 4-105-205.**Assistive device defined,** §4-105-201.**Current value of written lease,** §4-105-205.**Definitions,** §4-105-201.**Device not conforming to applicable express warranty.**

- Repair of nonconformity, §4-105-203.

**Express warranties,** §4-105-202.**Manufacturer team to have expressly warranted,** §4-105-202.**Offer to manufacturer to transfer possession of device.**

- Required to receive comparable new device or refund, §4-105-206.

**Reasonable allowance for use,** §§4-105-204, 4-105-205.**Reasonable amount of time to fix nonconformity,** §4-105-204.**Refund to consumer.**

- Failure fix nonconformity and reasonable amount of time, §§4-105-204, 4-105-206.

**Repair of nonconformity,** §4-105-203.

- Reasonable amount of time defects, §4-105-204.

**Replacement of device.**

- Failure to fix nonconformity in reasonable amount of time, §§4-105-204, 4-105-206.

**Return of device.**

- Failure to fix nonconformity in reasonable amount of time, §4-105-204.

**Valuation,** §4-105-205.**ASSOCIATIONS.****Benevolent associations.**

- Corporations, §4-28-102.

**Cooperative associations.**

- General provisions, §§4-30-101 to 4-30-118.

**ASSOCIATIONS —Cont'd****Fairs and associations of public nature.**

Applicability of corporations provisions, §4-28-101.

**Nonprofit corporations generally (1987), §§4-28-201 to 4-28-225.****Nonprofit corporations generally (1993), §§4-33-101 to 4-33-1707.****Registered agents.**

Model registered agents act, §§4-20-101 to 4-20-118.

**Unincorporated nonprofit associations, §§4-28-601 to 4-28-636.****ASSUMED NAMES.****Business under assumed name.**

Applicability of provisions, §4-70-201.

Certificate of withdrawal from or disposition of interest in business.

Filing, §4-70-204.

Certificate setting forth name.

Contents, §4-70-203.

Evidentiary effect of certified copy, §4-70-205.

Fees for clerk, §4-70-206.

Filing.

Required, §4-70-203.

Change in ownership of business.

Certificate to be filed, §4-70-204.

Corporations.

Exemption, §4-70-201.

County clerks.

Fees, §4-70-206.

Filing and indexing of certificates, §§4-70-203 to 4-70-205.

Limited liability company.

Conducting business under fictitious name, §4-32-108.

Partnerships.

Conducting business under fictitious name, §4-42-707.

Penalties.

Violations of provisions, §4-70-202.

Violations of provisions.

Penalties, §4-70-202.

**Corporations.**

Business under assumed name.

Exception to provisions, §4-70-201.

**Evidence.**

Business under assumed name.

Certificate setting forth name.

Certified copy of certificate as presumptive evidence, §4-70-205.

**ASSUMED NAMES —Cont'd****Fees.**

Business under assumed name.

Certificate setting forth name.

Fee of clerk for indexing and filing, §4-70-206.

**Partnerships.**

Business under assumed name.

Exceptions as to certain limited partnerships, §4-70-201.

**Penalties.**

Business under assumed name.

Violations of provisions, §4-70-201.

**Presumptions.**

Business under assumed name.

Certificate setting forth name.

Evidentiary effect, §4-70-205.

**ATHLETIC CLUBS.****Health spas.**

Consumer protection, §§4-94-101 to 4-94-109.

**ATHLETIC CONTESTS.****Credit card solicitation at college campus.**

Solicitations permitted at athletic events.

Institution to include credit seminar within freshman orientation, §4-104-203.

**ATTORNEY GENERAL.****Charitable contributions, solicitation.**

Nonresident organizations, service of process on attorney general, §4-28-413.

**Charitable sales promotion.**

Agreement by organization and commercial coventurer with attorney general, §4-28-408.

**Credit report security freezes.**

Remedies available to attorney general, §4-112-113.

**Foreign limited liability partnerships.**

Action by attorney general, §4-46-1105.

**Home solicitation sales.**

Enforcement of provisions, §4-89-106.

**Limited liability companies.**

Foreign limited liability company transacting business without registration.

Powers of attorney general, §4-32-1007.

**Limited liability partnerships.**

Foreign limited liability partnerships.

Action by attorney general, §4-46-1105.

**ATTORNEY GENERAL —Cont'd****Monopolies and restraint of trade.**

Actions and settlements by, §4-75-315.

Statute of limitations, §4-75-320.

Venue, §4-75-319.

Antitrust enforcement account.

Established in office, §4-75-317.

Unfair practices.

Actions by, §4-75-212.

Statute of limitations, §4-75-217.

Venue, §4-75-216.

Antitrust enforcement account.

Established in office of attorney general, §4-75-214.

**No call lists.**

Consumer telephone privacy act,  
§§4-99-401 to 4-99-408.

**Personal information protection act.**

Action by, violation punishable by,  
§4-110-108.

**Solicitation of charitable contributions by nonresident organization.**

Service of process on attorney general against nonresident organization,  
§4-28-413.

**Telephonic sellers.**

Agent for service, §4-99-109.

Enforcement of chapter, §4-99-111.

**ATTORNEYS AT LAW.****Franchises.**

Fees.

Misleading and fraudulent schemes.

Violation of provisions.

Franchisee's remedies,  
§4-72-208.

**Interest.**

Fees.

Award of fees in litigation involving  
usurious transaction, §4-57-108.

**Leases.**

Commercial code.

Fees.

Unconscionable lease contracts or  
clauses, §4-2A-108.

**Limited liability companies.**

Company engaged in practice of law  
acting in fiduciary capacity,  
§4-32-307.

Members, managers, etc., engaged in  
practice of law acting in fiduciary  
capacity on behalf of company,  
§4-32-307.

**Notario or notario publico.**

Notary advertising services as.

Inapplicability of provisions to  
attorneys, §4-109-104.

**ATTORNEYS AT LAW —Cont'd****Notario or notario publico —Cont'd**

Notary advertising services as  
—Cont'd

Not licensed to practice law,  
disclosure required, §4-109-103.

**Notes.**

Fees.

Allowable provisions in promissory  
notes for fees, §4-56-101.

**Promissory notes.**

Fees.

Allowable provisions in promissory  
notes for attorney's fees,  
§4-56-101.

**Trade secrets.**

Award of attorney's fees, §4-75-607.

**ATTORNEYS' FEES.****Cigarettes and tobacco products.**

Unfair cigarette sales.

Recovery of attorney's fees in actions  
for violations, §4-75-713.

**Consumer credit.**

Equal consumer credit act.

Actions for damages, §4-87-105.

**Contracts.**

Provisions in promissory notes for  
fees, §4-56-101.

**Copyright collection practices,**  
§4-76-107.**Credit report security freezes.**

Action for noncompliance, §4-112-112.

**Franchises.**

Misleading and fraudulent schemes.

Franchisee's remedies, §4-72-208.

**Lemon law.**

Enforcement of provisions, §4-90-415.

**Letters of credit.**

Wrongful dishonor or repudiation,  
§4-5-111.

**Limited partnerships.**

Derivative actions, §4-47-1005.

**Notes.**

Allowable provisions in notes  
providing in part for attorney's  
fees, §4-56-101.

**Odometer tampering, action for,**  
§4-90-207.**Pay per call.**

Consumer remedies, §4-98-105.

**Prize promotion,** §4-102-103.**Promissory notes.**

Allowable provisions, §4-56-101.

**Sales representatives.**

Noncompliance with provisions  
relating to payment of  
commission, §4-70-306.

**ATTORNEYS' FEES —Cont'd****Trade secrets.**

Award to prevailing party in actions,  
§4-75-607.

**Unincorporated nonprofit associations.**

Actions involving association.  
Reimbursement or payment of  
expenses, fees and costs,  
§4-28-627.

**AUCTIONS AND AUCTIONEERS.**

**Sale of goods,** §4-2-328.

**AUDITS AND AUDITORS.****Nonprofit corporations (1987).**

State financial assistance.  
Audit of nonprofit organizations  
receiving, §4-28-104.

**AUTHORITIES.**

**Water authorities,** §§4-35-101 to  
4-35-306.

**AUTOMOBILE DEALERS'  
ANTI-COERCION ACT.**

**Monopolies and restraint of trade,**  
§§4-75-401 to 4-75-412.

**B****BAILMENTS.****Sale of goods, UCC.**

Seller's remedy of stoppage of delivery  
in transit, §4-2-705.

**BAIT AND SWITCH.**

**Prohibited advertising,** §4-88-107.

**BANK DEPARTMENT.****Gift cards.**

Fair gift card act, rules promulgation,  
§4-88-706.

**BANK DEPOSITS AND  
COLLECTIONS, §§4-4-101 to  
4-4-504.****Alteration of customer's account.**

Customer's duty to discover and  
report, §4-4-406.

**Applicability of provisions, §4-4-102.**

Depository and collecting banks.

Collection of items, §4-4-201.

Variation by agreement, §4-4-103.

**Bankruptcy and insolvency.**

Collection of items.

Depository and collecting banks.

Insolvency and preference,  
§4-4-216.

Insolvency and preference, §4-4-216.

**Branch offices.**

Separate office of bank, §4-4-107.

**BANK DEPOSITS AND  
COLLECTIONS —Cont'd****Burden of proof.**

Stop payment orders.

Losses resulting from violation of  
orders, §4-4-403.

**Charge-back, §4-4-214.****Charging account of customer.**

When bank may charge, §4-4-401.

**Citation of article.**

Short title, §4-4-101.

**Collection of items.**

Liability of secondary party, §4-4-212.

Presentment of items by notice of item  
not payable by, through or at  
bank, §4-4-212.

**Conflict of laws, §4-4-102.****Contracts.**

Variation of article provisions by  
agreement, §4-4-103.

**Damages.**

Measure of damages, §4-4-103.

Wrongful dishonor, §4-4-402.

**Death of customer.**

Effect, §4-4-405.

**Definitions.**

Agreement for electronic presentment,  
§4-4-110.

Bank, §4-4-105.

Collecting bank, §4-4-105.

Depository bank, §4-4-105.

General commercial code definitions,  
§4-1-201.

Index of definitions, §4-4-104.

Intermediary bank, §4-4-105.

Payor bank, §4-4-105.

Presenting bank, §4-4-105.

**Delays, §4-4-109.****Depository and collecting banks.**

Collection of items, §§4-4-201 to  
4-4-216.

Agency status of collecting items,  
§4-4-201.

Charge-back, §4-4-214.

Credits for items.

Availability for withdrawal,  
§4-4-215.

Provisional status, §4-4-201.

When provisional credits become  
final, §4-4-215.

Death or incompetence of customer.

Effect, §4-4-405.

Debits for items.

When provisional credits become  
final, §4-4-215.

Endorsements.

"Pay any bank," §4-4-201.

Generally, §4-4-201.

**BANK DEPOSITS AND****COLLECTIONS —Cont'd****Depository and collecting banks —Cont'd**

Collection of items —Cont'd

Holders in due course.

When bank gives value, §4-4-211.

Instructions of transferor.

Effect, §4-4-203.

“Pay any bank.”

Items so endorsed, §4-4-201.

Payment of item by payor bank.

Final payment, §4-4-215.

Presentment of items.

Methods, §4-4-204.

Responsibility required, §4-4-202.

Security interest of collecting bank.

Items accompanying documents and proceeds, §4-4-210.

Sending items.

Methods, §4-4-204.

Settlement of items.

Medium and time of settlement, §4-4-213.

Provisional status, §4-4-201.

When provisional credits become final, §4-4-215.

Transfer of items.

Between banks, §4-4-206.

Unendorsed items.

Depository bank holder of, §4-4-205.

When action timely, §4-4-202.

Unendorsed items.

Depository bank holder of, §4-4-205.

Warranties.

Documents of title, §4-7-508.

Encoding and retention warranties, §4-4-209.

Presentment warranties, §4-4-208.

Transfer warranties, §4-4-207.

**Documentary drafts.**

Dishonor.

Duty to notify customer, §4-4-501.

Privilege of presenting bank to deal with goods, §4-4-504.

Reporting reasons for dishonor, §4-4-503.

Presentment.

Duty to send for presentment, §4-4-501.

“On arrival” drafts, §4-4-502.

**Documents of title.**

Negotiation and transfer.

Delivery without indorsement, §4-7-506.

Right to compel indorsement, §4-7-506.

**BANK DEPOSITS AND****COLLECTIONS —Cont'd****Electronic presentment, §4-4-110.****Endorsements.**

Collection of items.

Depository and collecting banks.

Items endorsed “pay any bank,” §4-4-201.

**General definitions, §4-4-104.****Holders in due course.**

Collection of items.

Depository and collecting banks.

When bank gives value for purposes of holder in due course, §4-4-211.

**Incapacitated persons.**

Effect of incompetence of customer, §4-4-405.

**Index of definitions, §4-4-104.****Interpretation and construction.**

Applicability of article, §4-4-102.

Depository and collecting banks.

Collection of items, §4-4-201.

Variation by agreement, §4-4-103.

**Liability.**

Collection of items.

Depository and collecting banks.

Liability of secondary parties, §4-4-212.

Wrongful dishonor.

Payor bank's liability to customer, §4-4-402.

**Limitation of actions, §4-4-111.**

Deposits and collections.

Unauthorized signature or alteration.

Claims against bank, §4-4-406.

**Mental illness.**

Incompetency of customer.

Authority of payor or collecting bank, §4-4-405.

**Ordinary care.**

Action constituting, §4-4-103.

**Payable through or payable at bank, §4-4-106.****Payor banks.**

Collection of items.

Death or incompetence of customer.

Effect, §4-4-405.

Deferred posting, §4-4-301.

Dishonor of items.

Time of dishonor, §4-4-301.

Items subject to notice, stop-payment order, legal process or setoff, §4-4-303.

Return of items.

Late return, §4-4-302.

## **BANK DEPOSITS AND COLLECTIONS —Cont'd**

### **Payor banks —Cont'd**

Collection of items —Cont'd

Return of items —Cont'd

Method of recovery of payment,  
§4-4-301.

Customer relationship.

Alteration of instruments.

Customer's duty to discover and  
report, §4-4-406.

Charging customer's account.

When allowed, §4-4-401.

Death of customer.

Effect, §4-4-405.

Dishonor, wrongful liability to  
customer, §4-4-402.

Incompetency of customer.

Effect, §4-4-405.

Stale checks.

Obligation of bank to pay,  
§4-4-404.

Stop payment orders.

Customer's right to issue,  
§4-4-403.

Subrogation on improper payment.

Right of payor bank, §4-4-407.

Unauthorized signatures.

Customer's duty to discover and  
report, §4-4-406.

Subrogation rights on improper  
payment, §4-4-407.

### **Presenting bank, §4-4-105.**

### **Presentment.**

Responsibility of presenting banks,  
§4-4-503.

### **Receipt of items.**

Delay, §4-4-109.

Time, §4-4-108.

### **Refunds, §4-4-214.**

### **Secured transactions.**

Depository and collecting banks.

Collection of items.

Security interests of collecting  
banks.

Items accompanying documents  
and proceeds, §4-4-210.

Documentary drafts.

Dishonor.

Privilege of presenting bank to  
deal with goods.

Security interest for expenses,  
§4-4-504.

### **Statute of limitations, §4-4-111.**

Deposits and collections.

Unauthorized signature or  
alteration.

Claims against bank, §4-4-406.

## **BANK DEPOSITS AND COLLECTIONS —Cont'd**

### **Warranties.**

Depository and collecting banks.

Documents of title, §4-7-508.

## **BANKRUPTCY AND INSOLVENCY.**

### **Bank deposits and collections.**

Depository and collecting banks.

Collection of items, §4-4-216.

### **Corporations.**

Definition of insolvent, §4-26-102.

### **Leases.**

Commercial code.

Lessee's rights to goods on lessor's  
insolvency, §4-2A-522.

### **Sale of goods.**

Buyer's insolvency.

Seller's remedies on discovery,  
§4-2-702.

### **Statute of frauds.**

Promises to pay debt discharged in  
bankruptcy.

Writing required, §4-59-101.

## **BANKS AND FINANCIAL INSTITUTIONS.**

### **Checks.**

Negotiable instruments, §§4-3-101 to  
4-3-605.

### **Commercial code.**

Bank deposits and collections,  
§§4-4-101 to 4-4-504.

Funds transfers, §§4-4A-101 to  
4-4A-507.

Negotiable instruments, §§4-3-101 to  
4-3-605.

### **Cooperative associations.**

Applicability of provisions, §4-30-202.

Commissioner in charge of  
noncomplying banks, §4-30-206.

Cumulative nature of subchapter,  
§4-30-203.

Declaration as investment companies,  
§4-30-207.

Definitions, §4-30-201.

Future incorporation of cooperative  
banks.

Prohibited, §4-30-204.

No further incorporation of cooperative  
banks, §4-30-204.

Noncomplying banks, §4-30-206.

Termination of corporate existence,  
§4-30-205.

### **Deposit accounts.**

Secured transactions.

Generally, §§4-9-101 to 4-9-709.

### **Deposits.**

Secured transactions.

Generally, §§4-9-101 to 4-9-709.

## **BANKS AND FINANCIAL INSTITUTIONS —Cont'd**

### **Electronic funds transfers.**

Commercial code provisions,  
§§4-4A-101 to 4-4A-507.

### **Fiduciaries.**

Foreign bank or trust company.  
Appointment authorized, §4-31-303.  
Defined, §4-31-302.  
Legislative intent, §4-31-301.

### **Foreign investor companies,** §§4-31-201 to 4-31-205.

### **Funds transfers, §§4-4A-101 to 4-4A-507.**

### **Secured transactions.**

Generally, §§4-9-101 to 4-9-709.

### **Wire transfers, §§4-4A-101 to 4-4A-507.**

## **BILLS OF LADING.**

### **Documents of title generally,** §§4-7-101 to 4-7-704.

### **Duplicate bills.**

Issue of duplicate bills not so marked.  
Penalty, §4-59-303.

### **False statements.**

Issue of bill containing.  
Penalty, §4-59-302.

### **Fraud, intent to defraud.**

Inducing carrier to issue bill when  
goods have not been received,  
§4-59-305.  
Issue of bill containing false  
statement, §4-59-302.  
Issue of bill for goods not received,  
§4-59-301.  
Issue of duplicate bills not so marked,  
§4-59-303.  
Issue of nonnegotiable bill not so  
marked, §4-59-304.

### **Liens.**

Negotiation of bill for goods upon  
which there is lien or mortgage,  
§4-59-306.

### **Negotiation of bill for mortgaged goods, §4-59-306.**

### **Negotiation of bill when goods not in carrier's possession, §4-59-307.**

### **Nonnegotiable bills.**

Issue of nonnegotiable bill not so  
marked, §4-59-304.

## **BONA FIDE PURCHASERS.**

### **Secured transactions.**

Priority of buyer in ordinary course of  
business, §4-9-320.  
Purchase from cosignee while goods in  
possession of cosignee, §4-9-319.  
Purchaser of chattel paper, priority,  
§4-9-330.

## **BONA FIDE PURCHASERS —Cont'd**

### **Secured transactions —Cont'd**

Sale of account or chattel paper.  
Buyer's security interest  
unperfected, §4-9-318.

## **BOND ISSUES.**

### **Refunding bonds.**

Water authorities, §4-35-306.

### **Water authorities, §§4-35-301 to 4-35-306.**

## **BONDS, SURETY.**

### **Certificates of deposit in lieu of bond, §4-25-102.**

### **Charitable organizations.**

Paid solicitor seeking charitable  
contributions, §4-28-407.

### **Corporations.**

Corporate security.  
Issuance of certificates of deposit or  
securities in lieu of bond,  
§4-25-102.

### **Going out of business sales.**

Licenses.  
Application for license.  
Application to be accompanied by  
bond, §4-74-107.

### **Paid solicitor, soliciting charitable contribution, §4-28-407.**

### **Service contracts.**

Surety bond of provider, §4-114-104.

### **Solicitors.**

Paid solicitors soliciting charitable  
contributions, §4-28-407.

### **Telephonic sellers, §4-99-107.**

## **BROADBAND SERVICES.**

### **Connect Arkansas broadband program, §§4-113-101 to 4-113-106.**

Council, §4-113-104.  
Critical infrastructure, §4-113-106.  
Definitions, §4-113-102.  
Goals of program, §4-113-103.  
Grants, §4-113-103.  
Nonprofit corporation, creation,  
§4-113-103.  
Priority for certain economic  
development plans, §4-113-106.  
Registration of service providers,  
§4-113-105.  
Title of act, §4-113-101.

## **BUILDINGS AND CONSTRUCTION.**

### **Contracts.**

Hold harmless clauses unenforceable,  
§4-56-104.

## **BULK TRANSFERS.**

### **Documents of title, §§4-7-101 to 4-7-704.**

**BURDEN OF PROOF.****Investment securities**, §4-8-114.**Leases.**

Commercial code.

Default of lessor.

Burden of establishing default  
after acceptance of goods,  
§4-2A-516.**Secured transactions.**Establishing purchase-money security  
interest, §4-9-103.**Service contracts.**

Enforcement of provisions, §4-114-111.

**Unfair competition and deceptive  
trade practices.**Exemption or exception from chapter  
applicability, §4-99-112.**BUSHEL.****Apples.**

Lawful measure, §4-18-332.

**Weight.**Legal weight of bushel of specified  
commodities, §4-18-331.**BUSINESS ASSOCIATIONS.****Corporations generally**, §§4-27-101 to  
4-27-1706.**Limited liability companies,**

§§4-32-101 to 4-32-1316.

**Limited liability partnerships,**

§§4-46-1001 to 4-46-1105.

**Limited partnerships**, §§4-47-101 to

4-47-1302.

**Partnerships**, §§4-46-101 to 4-46-1207.**BUSINESS TRUSTS.****Foreign business trusts**, §§4-31-401 to  
4-31-406.Amendment of articles, declaration of  
trust or trust agreement,  
§4-31-402.

Applicability of law, §4-31-403.

Assumed business name, affidavit  
setting forth, §4-31-402.Certificate showing compliance with  
filing requirements, issuance,  
§4-31-402.

Defined, §4-31-401.

Discontinuing trust business,  
§4-31-404.

Filing fees, §4-31-406.

Filing requirements to do business in  
state, §4-31-402.Foreign corporations doing business in  
state.Applicability of law in effect with  
respect to, §4-31-403.Location of principal office, delivery to  
secretary of state, §4-31-402.**BUSINESS TRUSTS —Cont'd****Foreign business trusts —Cont'd**

Merger or consolidation, §4-31-405.

Registered agent for service, named  
delivered to secretary of state,  
§4-31-402.Requirements to do business,  
§4-31-402.Service of process, irrevocable consent  
delivered to secretary of state,  
§4-31-402.Withdrawal from or discontinue doing  
trust business, §4-31-404.**C****CALENDARS.****School calendars.**Disclosures by solicitors for  
advertisements on, §§4-88-501 to  
4-88-503.

Definitions, §4-88-501.

Penalties, §4-88-503.

Violations, §4-88-502.

**CALLER IDENTIFICATION****BLOCKING BY TELEPHONIC  
SELLERS.****Definitions**, §4-99-301.**Penalties and remedies**, §4-99-303.**Prohibition**, §4-99-302.**Unfair or deceptive practice**,  
§4-99-303.**CALLER IDENTIFICATION****SERVICE.****Deceptive trade practices.**

Defined, §4-88-102.

Fictitious or misleading names or  
telephone numbers.Displaying resident's service,  
§4-88-107.**Telephone sellers.**

Defined, §4-99-103.

Fictitious or misleading name or  
telephone number.

Displaying, §§4-99-103, 4-99-201.

**C. & F.****Sale of goods, UCC**, §§4-2-320, 4-2-321.**CARRIERS.****Documents of title**, §§4-7-101 to  
4-7-704.**Duty of care.**

Carrier issuing bill of lading, §4-7-309.

**Freight.**Freight and parcel delivery services.  
Interest on deposits for, §4-86-104.

**CARRIERS —Cont'd****Interest.**

- Freight and parcel delivery services.
- Interest on deposits, §4-86-104.

**Liens.**

- Bills of lading, §4-7-307.
- Enforcement of liens, §4-7-308.

**CASHIERS CHECKS.****Defined, §4-3-104.****Effect on obligation for which taken, §4-3-310.****Negotiable instruments.**

- Generally, §§4-3-101 to 4-3-605.

**Obligation of issuer, §4-3-412.****Refusal to pay, §4-3-411.****CATS.****Lemon law, §4-97-105.****CEASE AND DESIST ORDERS.****Service contracts.**

- Enforcement of provisions, §4-114-111.

**CERTIFICATES OF DEPOSIT.****Bank deposits and collections generally, §§4-4-101 to 4-4-504.****Defined, §4-3-104.****CERTIFICATES OF TITLE.****Secured transactions.**

- Goods covered by certificate of title.
- Law governing perfection and priority, §4-9-303.
- Priority of security interest in, §4-9-337.

**CERTIFIED CHECKS.****Acceptance, §4-3-409.****Defined, §4-3-409.****Negotiable instruments.**

- Generally, §§4-3-101 to 4-3-605.

**CHARITABLE ORGANIZATIONS.****Agreement by organization and commercial coventurer with attorney general, §4-28-408.****Contributions.**

- Regulation of solicitations generally, §§4-28-401 to 4-28-416.

**Corporations.**

- Gifts authorized, §4-25-103.

**Insurance.**

- Life insurance policy naming charitable institution, organization, etc., as beneficiary, §4-28-103.

**Nonprofit corporations generally (1987), §§4-28-201 to 4-28-225.****Nonprofit corporations generally (1993), §§4-33-101 to 4-33-1707.****CHARITABLE ORGANIZATIONS****—Cont'd****Records.**

- Solicitation of contributions.
- Containers, §§4-103-201 to 4-103-205.

**Solicitation of contributions, §§4-28-401 to 4-28-416.****CHARITABLE SOLICITATIONS, §§4-28-401 to 4-28-416.****Action, suit, or proceeding against nonresident organization.**

- Consent, service of process, §4-28-413.

**Annual financial reports and fiscal reports, §4-28-403.****Attorney general.**

- Charitable sales promotion.
- Agreement by organizations and commercial coventurer with attorney general, §4-28-408.
- Nonresident organizations, service of process on attorney general, §4-28-413.

**Audit report.**

- Certain organizations to include when submitting tax records, §4-28-403.

**Bond of paid solicitor, §4-28-407.****Charitable sales promotion.**

- Agreement by organization and commercial coventurer with attorney general, §4-28-408.

**Commercial coventurer.**

- Charitable sales promotion on behalf of organization.
- Agreement with attorney general, §4-28-408.

**Confusingly similar names, organization using, §4-28-412.****Consent to use of organization name.**

- Paid solicitor to obtain prior to solicitation, §4-28-407.

**Containers, §§4-103-201 to 4-103-205.**

- Definitions, §4-103-201.
- Disclosure label requirement, §4-103-202.

- Enforcement of provisions, §4-103-204.

- Exemptions from requirements, §4-103-203.

- Supplemental nature of provisions, §4-103-205.

- Violations as unfair and deceptive trade practices, §4-103-204.

**Contract between paid solicitor and charitable organization, §4-28-407.****Contracts between charitable organization and fund-raising counsel, §4-28-405.**

**CHARITABLE SOLICITATIONS**

—Cont'd

**Copies of documents, requirements,**  
§4-28-410.**Deceptive trade practices act,**  
§4-28-416.**Definitions,** §4-28-401.**Disclosure of donor list and other records,** §4-28-403.**Disclosures required,** §4-28-409.**Disposition of fees collected by attorney general,** §4-28-415.**Document requirements,** §4-28-410.**Donation of tickets for event.**

Paid solicitors, representations and records, §4-28-407.

**Donor list, disclosure,** §4-28-403.**Educational institutions.**

Exemption from registration and financial disclosure, §4-28-404.

**Exemptions from registration and financial disclosure requirements,** §4-28-404.**False or misleading statements on documents,** §4-28-412.**Financial transaction jeopardizing or interfering with organization's purpose,** §4-28-412.**Full-time employees of charitable organization.**

Disclosure requirements not applicable, §4-28-409.

**Fund-raising counsel.**

Contracts with charitable organization, §4-28-405.

Registration fees, §4-28-406.

**Governmental organizations.**

Exemption from registration and financial disclosure, §4-28-404.

**Identity of person responsible for soliciting funds.**

Disclosure required prior to solicitation, §4-28-409.

**Inspection and examination of documents,** §4-28-410.**Misrepresentations during solicitation,** §4-28-412.**Nonresident organizations.**

Consent to suit, proceeding or action, service of process, §4-28-413.

**Ordinances enacted by city or incorporated town not prohibited,** §4-28-414.**Paid solicitor.**

Bond, §4-28-407.

Consent by organization to use of name prior to solicitation, §4-28-407.

**CHARITABLE SOLICITATIONS**

—Cont'd

**Paid solicitor —Cont'd**

Contracts with charitable organization, §4-28-407.

Defined, §4-28-401.

Deposit of contribution receipt, time limit, §4-28-407.

Donation of tickets to event, requirements for representation, §4-28-407.

Financial report for campaign, §4-28-407.

Recordkeeping requirements, §4-28-407.

Registration, fees, §4-28-407.

**Percentage of funds raised being paid to solicitor.**

Disclosure upon request by solicited person, §4-28-409.

**Political candidates and organizations.**

Exemption from registration and financial disclosure, §4-28-404.

**Professional status of solicitor.**

Disclosure prior to solicitation, §4-28-409.

**Professional telemarketers.**

Defined, §4-28-401.

Employment requirements, registration, §4-28-411.

**Prohibited acts,** §4-28-412.**Records,** §4-28-403.**Registration of charitable organizations.**

Prior to solicitation, §4-28-402.

**Registration of fund-raising counsel,** §4-28-406.**Registration of paid solicitor,** §4-28-407.**Registration of professional telemarketers,** §4-28-411.**Religious organizations.**

Exemption from registration and financial disclosure, §4-28-404.

**Reports,** §4-28-403.**Representing association with another charitable organization without consent,** §4-28-412.**Retention of records, time period,** §4-28-403.**Retention of true and correct copies of documents, requirements,** §4-28-409.**Service of process on nonresident organization,** §4-28-413.**Tax or information returns.**

Annual filing, §4-28-403.

**CHARITABLE SOLICITATIONS**

—Cont'd

**Telemarketers.**Professional telemarketer defined,  
§4-28-401.Registration of professional  
telemarketers, §4-28-411.**Tickets donated for event.**Paid solicitors, representations and  
records, §4-28-407.**Unfair and deceptive act or practice.**

Violation constitutes, §4-28-416.

**Use or display of organization name  
or emblem without consent,**  
§4-28-412.**Volunteers.**Disclosure requirements not  
applicable, §4-28-409.**Writing, documents required to be  
in writing, §4-28-410.****CHATTEL PAPER.****Negotiable instruments generally,**  
§§4-3-101 to 4-3-605.**Secured transactions.**

Electronic chattel paper.

Control, §4-9-105.

Duties of secured party having  
control of collateral, §4-9-208.

Perfection by control, §4-9-314.

Generally, §§4-9-101 to 4-9-709.

Perfection of security interest in,  
§4-9-312.

Priority of purchaser, §4-9-330.

**CHECKS.****Cashier's checks.**

Defined, §4-3-104.

Effect on obligation for which taken,  
§4-3-310.

Obligation of issuer, §4-3-412.

Refusal to pay, §4-3-411.

**Certified checks.**

Acceptance, §4-3-409.

Defined, §4-3-409.

**Definitions.**

Insufficient funds, §4-60-101.

**Dishonor, §4-3-502.****Effect on obligation for which taken,**  
§4-3-310.**Insufficient funds.**

Applicability of chapter, §4-60-102.

Definitions, §4-60-101.

Restitution.

Liability for, §4-60-103.

**Negotiable instruments generally,**  
§§4-3-101 to 4-3-605.**Restitution, §§4-60-101 to 4-60-103.****CHECKS —Cont'd****Sale of goods, UCC.**

Payment by check, §4-2-511.

**Telemarketers submitting check for  
payment.**Express consent of consumer required,  
§4-99-203.**Teller's checks.**

Defined, §4-3-104.

Effect on obligation for which taken,  
§4-3-310.

Refusal to pay, §4-3-411.

**Traveler's checks.**

Defined, §4-3-104.

**CHEROKEES.****Nonprofit corporations generally  
(1993), §§4-33-101 to 4-33-1707.****CHILDREN AND MINORS.****Debts.**

Statute of frauds.

Promise to pay debt contracted  
during infancy.

Writing required, §4-59-101.

**Statute of frauds.**Promise to pay debt contracted during  
infancy.

Writing required, §4-59-101.

**CHOICE OF LAW.****Commercial code.**Parties' power to choose applicable  
law, §4-1-301.**Letters of credit, §4-5-116.****C.I.F.****Sale of goods, UCC, §§4-2-320, 4-2-321.****CIGARETTES AND TOBACCO  
PRODUCTS.****Advertising.**

Unfair cigarette sales.

Sales at less than cost.

Evidentiary effect of  
advertisement for, §4-75-708.**Contracts.**

Unfair cigarette sales.

Contracts in violation of act void,  
§4-75-705.**Damages.**

Unfair cigarette sales.

Violations of provisions, §4-75-713.

**Definitions.**

Unfair cigarette sales, §4-75-702.

**Evidence.**

Costs.

Sales at less than cost.

Advertisements, §4-75-708.

Unfair cigarette sales.

Costs, §4-75-711.

## **CIGARETTES AND TOBACCO PRODUCTS —Cont'd**

### **Injunctions.**

Unfair cigarette sales.

Violations of provisions, §4-75-713.

### **Licenses.**

Sales, §4-75-707.

### **Penalties.**

Unfair cigarette sales.

Sales at less than cost, §4-75-708.

### **Sales.**

Licenses, §4-75-707.

Unfair cigarette sales, §§4-75-701 to 4-75-714.

### **Tobacco control board.**

Law enforcement powers, §4-75-714.

### **Unfair cigarette sales.**

Advertising.

Evidentiary effect of advertisement to sell at less than cost, §4-75-708.

Attorneys' fees.

Recovery in actions for violations, §4-75-713.

Citation of act.

Short title, §4-75-701.

Combination sales, §4-75-709.

Competition.

Transactions to meet lawful competition authorized, §4-75-704.

Contracts.

Void contracts.

Contracts in violation of act, §4-75-705.

Costs.

Basic cost of cigarettes.

Defined, §4-75-702.

Sales outside ordinary channels of business not permissible to establish, §4-75-712.

Definitions.

Basic cost of cigarettes, §4-75-702.

Cost to retailer, §4-75-702.

Cost to wholesaler, §4-75-702.

Evidence, §4-75-711.

Cost survey, §4-75-711.

Sales at less than cost.

Advertisements.

Evidentiary effect, §4-75-708.

Combination sales, §4-75-709.

Prohibited, §4-75-708.

Sales by wholesaler to other wholesalers, §4-75-710.

Damages.

Violations of provisions, §4-75-713.

Definitions, §4-75-702.

## **CIGARETTES AND TOBACCO PRODUCTS —Cont'd**

### **Unfair cigarette sales —Cont'd**

Director of tobacco control.

Enforcement agents, §4-75-714.

Enforcement of provisions, §4-75-713.

Powers and duties, §4-75-706.

Enforcement agents, §4-75-714.

Evidence.

Cost, §4-75-711.

Cost survey, §4-75-711.

Exceptions, §4-75-703.

Injunctions.

Violations of provisions, §4-75-713.

Licenses.

Required, §4-75-707.

Revocation or suspension.

Power of director of tobacco control, §4-75-706.

Misdemeanors.

Sales at less than cost, §4-75-708.

Penalties.

Sales at less than cost, §4-75-708.

Price fixing.

Investigation by director of tobacco control, §4-75-706.

Retailers.

Defined, §4-75-702.

Licenses, §4-75-707.

Title of act.

Short title, §4-75-701.

Violations of provisions.

Contracts in violation void, §4-75-705.

Damages, §4-75-713.

Injunctions, §4-75-713.

Wholesalers.

Defined, §4-75-702.

Licenses, §4-75-707.

Sales by wholesaler to other wholesaler, §4-75-710.

### **Unfair cigarette sales act.**

Coupons supplied to customer.

Redemption by retailer, §4-75-709.

Intent to injure competitors and destroy competition.

Prima facie evidence, §4-75-708.

Promotional allowance provided to wholesaler or retailer.

Passing to purchaser, §4-75-709.

## **CLAIMS.**

### **Corporations.**

Dissolution.

Filing or barring claims, §4-26-1105.

### **Documents of title.**

Conflicting claims.

Interpleader, §4-7-603.

**CLAIMS —Cont'd****Lemon law.**

Notice by consumer, §4-90-404.

**Nonprofit corporations (1993).**

Known claims against voluntary dissolved corporation, §4-33-1407.

Unknown claims against voluntary dissolved corporation, §4-33-1408.

**CLASS ACTIONS.****Consumer credit.**

Equal consumer credit act.

Prohibited, §4-87-103.

**CLOSING OUT SALES.**

**General provisions**, §§4-74-101 to 4-74-111.

**CLUBS.****Health spas.**

Consumer protection, §§4-94-101 to 4-94-109.

**COERCION.****Automobile dealers' anti-coercion act.**

Monopolies and restraint of trade, §§4-75-401 to 4-75-412.

**COLLATERAL.**

**Secured transactions**, §§4-9-101 to 4-9-709.

**COLLECTION AGENCIES.****Credit reporting disclosures.**

General provisions, §§4-93-101 to 4-93-104.

**Reports.**

Credit reporting disclosures.

General provisions, §§4-93-101 to 4-93-104.

**Telephone solicitations**, §4-99-202.

**COLLEGES AND UNIVERSITIES.****Credit card solicitation on college campus**, §§4-104-201 to 4-104-204.

Athletic events, solicitations at.

Credit seminar within institutions freshman orientation, §4-104-203.

Definitions, §4-104-201.

Face-to-face solicitations, §4-104-202.

Fine for violation, §4-104-204.

Misdemeanor for violation, §4-104-204.

Personal solicitation of credit card application, §4-104-202.

**COMMERCE.****Monopolies and restraint of trade.**

Lawful commerce excepted from prohibition, §4-75-303.

**COMMERCIAL CODE**, §§4-4-101 to 4-10-103.

**Bank deposits and collections**, §§4-4-101 to 4-4-504.

**Construction and interpretation.**

Course of performance and course of dealing, §4-1-303.

Definitions.

General commercial code definitions, §4-1-201.

Effective date, §4-10-101.

Gender, §4-1-106.

General repealer, §4-10-103.

General rules of construction, §4-1-102.

Implicit repeal.

Construction against, §4-1-104.

Knowledge.

What constitutes, §4-1-202.

Lease distinguished from security interest, §4-1-203.

Liberal administration of remedies, §4-1-305.

Notice.

When person deemed to have notice, §4-1-202.

Number, §4-1-106.

Reasonable time, §4-1-205.

Repeal of specific provisions, §4-10-102.

Seasonableness, §4-1-205.

Severability of provisions, §4-1-105.

Supplementary general principles of law.

Applicable, §4-1-103.

Transitional provisions, §4-10-102.

Value.

When person deemed to give value, §4-1-204.

**Definitions.**

General definitions, §§4-1-201, 4-1-303.

**Documents of title**, §§4-7-101 to 4-7-704.

**Effective date**, §4-10-101.

**Electronic signatures in global and national commerce act.**

Relation of commercial code to, §4-1-108.

**Funds transfers**, §§4-4A-101 to 4-4A-507.

**General provisions.**

Acceleration.

Option to accelerate at will, §4-1-309.

Agreements.

Variation of code, §4-1-102.

Applicability of provisions.

Territorial application, §4-1-301.

**COMMERCIAL CODE —Cont'd****General provisions —Cont'd**

Applicable law.

Supplementary general principles of law, §4-1-103.

Captions of sections.

Construction, §4-1-107.

Choice of law.

Parties' power to choose applicable law, §4-1-301.

Citation of title.

Short title, §4-1-101.

Construction and interpretation.

Course of performance and course of dealing, §4-1-303.

Gender, §4-1-106.

General rules of construction, §4-1-102.

Implicit repeal.

Construction against, §4-1-104.

Knowledge.

What constitutes, §4-1-202.

Lease distinguished from security interest, §4-1-203.

Liberal administration of remedies, §4-1-305.

Number, §4-1-106.

Reasonable time, §4-1-205.

Seasonableness, §4-1-205.

Value.

When person deemed to give value, §4-1-204.

Definitions, §§4-1-201, 4-1-303.

Electronic signatures in global and national commerce act.

Relation to, §4-1-108.

Evidence.

Third-party documents.

Prima facie evidence by, §4-1-307.

Good faith.

Obligation of good faith, §4-1-304.

Knowledge.

What constitutes, §4-1-202.

Notice.

When person deemed to have notice, §4-1-202.

Presumptions, §4-1-206.

Purposes of code, §4-1-102.

Renunciation of claim or right after breach, §4-1-306.

Reservation of rights.

Performance or acceptance under, §4-1-308.

Section captions, §4-1-107.

Severability of provisions, §4-1-105.

Supplementary general principles of law.

Applicable, §4-1-103.

**COMMERCIAL CODE —Cont'd****General provisions —Cont'd**

Severability of provisions, §4-1-105.

Short title, §4-1-101.

Subordinated obligations, §4-1-310.

Value.

When person deemed to give value, §4-1-204.

Variation of code by agreement, §4-1-102.

Variation of provisions by agreement, §4-1-302.

Waiver of claim or right after breach, §4-1-306.

**Good faith.**

Obligation of good faith, §4-1-304.

**Investment securities**, §§4-8-101 to 4-8-603.**Leases**, §§4-2A-101 to 4-2A-532.**Letters of credit**, §§4-5-101 to 4-5-120.**Negotiable instruments**, §§4-3-101 to 4-3-605.**Obligation of good faith**, §4-1-304.**Presumptions**, §4-1-206.**Sale of goods**, §§4-2-101 to 4-2-725.**Secured transactions**, §§4-9-101 to 4-9-709.**Severability of provisions**, §4-1-105.**Transitional provisions**, §4-10-102.

General repealer, §4-10-103.

Specific repeals, §4-10-102.

**COMMERCIALLY REASONABLE CONDUCT.****Secured transactions.**

Secured party's collection and enforcement after default.

Determining if conduct commercially reasonable, §4-9-627.

**COMMODITIES.****Secured transactions.**

Generally, §§4-9-101 to 4-9-709.

**COMMON CARRIERS.****Documents of title**, §§4-7-101 to 4-7-704.**COMPARATIVE FAULT.****Bank deposits and collections.**

Unauthorized signature or alteration, §4-4-406.

**Negotiable instruments.**

Forged signature or alteration of instrument, §4-3-406.

**COMPLAINTS.****Limited partnerships.**

Derivative actions, §4-47-1004.

**COMPUTERS AND SOFTWARE.****Connect Arkansas broadband program**, §§4-113-101 to 4-113-106.

**COMPUTERS AND SOFTWARE**

—Cont'd

**Personal information protection act,**  
§§4-110-101 to 4-110-108.**Secured transactions.**Purchase-money security interest in  
software, §4-9-103.**Spyware.**Consumer protection against computer  
spyware act, §§4-111-101 to  
4-111-105.**COMPUTER SPYWARE, §§4-111-101**  
to 4-111-105.**Action by attorney general under**  
**deceptive trade practices act.**

Violation punishable by, §4-111-104.

**Blocking installation or disabling**  
**software.**Preventing authorized user from,  
§4-111-103.**Consumer protection against**  
**computer spyware act.**

Short title, §4-111-101.

**Copying software on to computer.**

Unlawful acts, §4-111-103.

**Definitions, §4-111-102.****Hacking, §4-111-103.****Internet.**

Access to or use of.

Unlawful use of software to modify  
settings, §4-111-103.**Personally identifiable information.**Collecting through deceptive means,  
§4-111-103.**Persons not authorized users.**

Unlawful acts, §4-111-103.

**Phishing, §4-111-103.**

Defined, §4-111-102.

**Security antispyware or antivirus**  
**software.**Removing, disabling or rendering  
inoperative, §4-111-103.**Spyware monitoring fund.**Fines and penalties paid into, use of  
fund, §4-111-105.**Unlawful acts, exceptions, §4-111-103.****COMPUTER VIRUS.****Consumer protection against**  
**computer spyware act,**

§§4-111-101 to 4-111-105.

**Defined, §4-111-102.****CONFIDENTIALITY OF**  
**INFORMATION.****Consumer protection.**Deceptive trade practices.  
Investigations, §4-88-111.**CONFIDENTIALITY OF**  
**INFORMATION —Cont'd****Trade secrets.**

Actions under provisions.

Preservation of secrecy, §4-75-605.

**CONFLICT OF LAWS.****Foreign limited liability companies.**

Law governing, §4-32-1001.

**Foreign limited partnerships.**

Law governing generally, §4-47-901.

**Investment securities, §4-8-110.****Leases, UCC.**Leases subject to other statutes,  
§4-2A-104.Limitation on power of parties to  
choose applicable law and judicial  
forum, §4-2A-106.**Limited liability companies.**

Foreign limited liability companies.

Law governing, §4-32-1001.

Governing law, §4-32-1314.

Interstate application of chapter,  
§4-32-1307.**Limited partnerships.**

Foreign limited partnerships.

Law governing generally, §4-47-901.

**Monopolies and restraint of trade.**

Unfair practices act.

Provisions controlling, §4-75-211.

**Motor vehicle sales contracts.**

Forum selection clauses, §4-75-413.

**Partnerships.**

Foreign limited partnerships.

Law governing generally, §4-47-901.

**Secured transactions.**Law governing perfection and priority,  
§§4-9-301 to 4-9-307.**Trade secrets.**

Effect of act on other laws, §4-75-602.

**Unincorporated nonprofit****associations, §4-28-604.**

Relation to other laws, §4-28-603.

**CONFLICTS OF INTEREST.****Corporations.**

Directors, §4-27-831.

**Nonprofit corporations.**

Loans to directors and officers.

Prohibited, §4-28-220.

**Nonprofit corporations (1993).**

Directors, §4-33-831.

**Unincorporated nonprofit**  
**associations.**

Managers, §4-28-623.

**CONNECT ARKANSAS****BROADBAND PROGRAM,**

§§4-113-101 to 4-113-106.

**CONSENT.****Limited partnerships.**

Proxies of partners for consent purposes, §4-47-118.

**Nonprofit corporations.**

Corporation's acceptance of consent, §4-28-224.

**Partnerships.**

Consent on plan of conversion, §4-46-903.

Consent to plan of merger, §4-46-907.

**Registered agents.**

Appointment filing as affirmation of consent of agent, §4-20-105.

**CONSERVATORS.****Elderly and individuals with disabilities.**

Limited liability companies.

Powers as to incompetent member's interest, §4-32-707.

**CONSIDERATION.****Letters of credit,** §4-5-105.**Negotiable instruments.**

Definition of "consideration," §4-3-303.

**CONSIGNMENTS.****Art consignment act,** §§4-73-201 to 4-73-207.**Documents of title.**

Bills of lading.

Reconsignment, §4-7-303.

**CONSPIRACY.****Farm machinery.**

Hour meters on farm machinery.

Violation of subchapter, §4-96-202.

**Hour meters on farm machinery.**

Violation of subchapter, §4-96-202.

**Monopolies and restraint of trade.**

Fixing prices or quantity of products.

Prohibited, §4-75-309.

Lawful commerce excepted, §4-75-303.

**CONSUMER CREDIT.****Class actions.**

Equal consumer credit act.

Prohibited, §4-87-103.

**Credit reporting disclosures.**

General provisions, §§4-93-101 to 4-93-104.

**Credit report security freezes,**

§§4-112-101 to 4-112-114.

**Damages.**

Equal consumer credit act.

Violations, §4-87-105.

**Definitions.**

Financial transaction cards, §4-59-501.

**Discrimination.**

Equal consumer credit act, §§4-87-101 to 4-87-105.

**CONSUMER CREDIT —Cont'd****Equal consumer credit act.**

Attorneys' fees.

Recovery in actions for violations, §4-87-105.

Citation of act.

Short title, §4-87-101.

Class actions.

Prohibited, §4-87-103.

Discrimination based on sex or marital status.

Damages, §4-87-105.

Unlawful, §4-87-104.

Jurisdiction.

Actions for violations, §4-87-102.

Title of act.

Short title, §4-87-101.

**Financial transaction cards.**

Definitions, §4-59-501.

Felonies.

Remission to acquirer of record of sale not made by remitter, §4-59-502.

Solicitation of merchant to remit record of sale not made by the merchant, §4-59-503.

**Jurisdiction.**

Equal consumer credit act.

Actions for violations, §4-87-102.

**Rental-purchase agreements,**

§§4-92-101 to 4-92-107.

**Reports.**

Credit reporting disclosures.

General provisions, §§4-93-101 to 4-93-104.

Credit report security freezes, §§4-112-101 to 4-112-114.

**CONSUMER LEASES.****Commercial code leases generally,**

§§4-2A-101 to 4-2A-532.

**CONSUMER PROTECTION.****Action by any person suffering damage or injury,** §4-88-113.**Advertising.**

"Bait and switch" advertising.

Prohibited, §4-88-107.

Unlawful practices, §4-88-107.

**Appeals.**

Court orders for production of witnesses and evidence, §4-88-112.

**Applicability of chapter,** §4-88-101.**Assistive device warranty,**

§§4-105-201 to 4-105-206.

**Attorney general.**

Consumer advisory board, §4-88-106.

Enforcement.

Powers, §§4-88-111, 4-88-112.

**CONSUMER PROTECTION —Cont'd****Attorney general —Cont'd**

Office of attorney general.

Consumer protection division,  
§4-88-105.**Caller identification service.**

Deceptive trade practices.

Defined, §4-88-102.

Fictitious or misleading names or  
telephone numbers.Displaying resident's service,  
§4-88-107.

Telephone sellers.

Defined, §4-99-103.

Fictitious or misleading name or  
telephone number.

Displaying, §§4-99-103, 4-99-201.

**Compliance with provisions.**

Voluntary compliance, §4-88-114.

**Computer spyware.**Consumer protection against computer  
spyware act, §§4-111-101 to  
4-111-105.**Confidentiality of information.**

Deceptive trade practices.

Investigations, §4-88-111.

**Construction and interpretation.**

Applicability of chapter, §4-88-101.

**Consumer advisory board.**

Appointment, §4-88-106.

Chairman.

Election, §4-88-106.

Composition, §4-88-106.

Deceptive trade practices, §4-88-106.

Duties, §4-88-106.

Expenses of members, §4-88-106.

Number of members, §4-88-106.

Terms of members, §4-88-106.

**Consumer credit.**Equal consumer credit act, §§4-87-101  
to 4-87-105.**Contempt.**Court orders for production of  
witnesses and evidence.

Disobedience of order, §4-88-112.

**Credit card processing services,**

§§4-115-101 to 4-115-103.

**Credit reporting disclosures.**General provisions, §§4-93-101 to  
4-93-104.**Credit report security freezes,**

§§4-112-101 to 4-112-114.

**Debt cancellation agreements,**

§§4-90-701 to 4-90-705.

**Deceptive trade practices.**

Advertising.

Bait and switch advertising,  
§4-88-107.**CONSUMER PROTECTION —Cont'd****Deceptive trade practices —Cont'd**

Applicability of chapter, §4-88-101.

Caller identification service.

Defined, §4-88-102.

Fictitious or misleading names or  
telephone numbers.Displaying resident's service,  
§4-88-107.Concealment, suppression or omission  
of material facts, §4-88-108.

Consumer advisory board, §4-88-106.

Disparaging goods, services or  
businesses of another, §4-88-107.

Division.

Consumer protection division,  
§4-88-105.Enhanced penalties for targeting  
seniors and individuals with  
disabilities, §§4-88-201 to  
4-88-207.

Enumeration, §4-88-107.

Home solicitation sales.

Definition of deceptive trade  
practices, §4-89-102.

Injunctions, §4-88-104.

Investigations, §4-88-111.

Confidentiality of information,  
§4-88-111.Failure to cooperate in  
investigations, §4-88-112.

Lemon law violations, §4-90-417.

Misrepresentation, §4-88-107.

Penalties, §4-88-103.

Pyramid schemes, §4-88-109.

Remedies, §4-88-113.

**Definitions, §4-88-102.**

Deceptive trade practices.

Enhanced penalties for targeting  
elderly and individuals with  
disabilities, §4-88-201.

Financial transaction cards, §4-59-501.

Home solicitation sales, §4-89-102.

**Disabilities, individuals with.**

Deceptive trade practices.

Enhanced penalties when targeting  
certain individuals, §§4-88-201  
to 4-88-207.**Discount cards.**Health-related discount cards,  
§§4-106-201 to 4-106-205.**Division.**

Creation, §4-88-104.

Deceptive trade practices.

Consumer protection division,  
§4-88-105.

Director.

Appointment, §4-88-105.

**CONSUMER PROTECTION —Cont'd****Division —Cont'd**

Duties, §4-88-105.

Expenses, §4-88-105.

Powers, §4-88-105.

Staff.

Appointment, §4-88-105.

**Door to door sales.**

General provisions, §§4-89-101 to 4-89-110.

**Electronic mail.**

Unsolicited commercial and sexually explicit electronic mail prevention act, §§4-88-601 to 4-88-607.

Authority of providers, §4-88-604.

Civil action, §4-88-606.

Criminal penalty, §4-88-605.

Definitions, §4-88-602.

Enforcement of provisions, §4-88-607.

Notice by recipient not to send future communications, §4-88-603.

Preexisting business or personal relationship with recipient.

Commercial mail not unsolicited, §4-88-603.

Requirements for sending, §4-88-603.

Short title, §4-88-601.

**Enforcement of provisions.**

Attorney general, §4-88-111.

Civil enforcement, §4-88-113.

**Equal consumer credit act.**

General provisions, §§4-87-101 to 4-87-105.

**Evidence.**

Court order for production of evidence, §4-88-112.

Trade secrets.

Evidence held in camera, §4-88-111.

**Fair gift card act, §§4-88-701 to 4-88-706.****Financial transaction cards.**

Record of sale.

Definitions, §4-59-501.

Felonies.

Remission to acquirer of record of sale not made by remitter, §4-59-502.

Solicitation of merchant to remit record of sale not made by the merchant, §4-59-503.

**Fraud.**

Financial transaction cards.

Remission to acquirer of record of sale not made by remitter, §4-59-502.

**CONSUMER PROTECTION —Cont'd****Fraud —Cont'd**

Financial transaction cards —Cont'd

Solicitation of merchant to remit record of sale not made by the merchant, §4-59-503.

Prohibited acts, §§4-88-107, 4-88-108.

**Gifts.**

Fair gift card act, §§4-88-701 to 4-88-706.

Unsolicited merchandise, §4-86-103.

**Health-related discount cards, §§4-106-201 to 4-106-205.****Health spas, §§4-94-101 to 4-94-109.****Home solicitation sales.**

General provisions, §§4-89-101 to 4-89-110.

**Information technology.**

Consumer protection against computer spyware act, §§4-111-101 to 4-111-105.

Personal information protection act, §§4-110-101 to 4-110-108.

**Injunctions.**

Powers of courts, §4-88-112.

Unlawful practices, §4-88-104.

**Investigations.**

Deceptive trade practices, §4-88-111.

Failure to cooperate in investigations, §4-88-112.

Powers and duties of consumer protection division, §4-88-105.

**Lemon law.**

Pet stores, §4-97-105.

**Liability.**

Product liability, §4-86-102.

Warranties.

Breach of warranty, §4-86-101.

**Limitation of actions, §4-88-115.****Mail and telephone solicitation sales.**

General provisions, §§4-95-101 to 4-95-108.

**Misrepresentation.**

Deceptive trade practices, §4-88-107.

Concealment, suppression or omission of material facts, §4-88-108.

**Motor vehicles.**

Aftermarket crash parts.

General provisions, §§4-90-301 to 4-90-307.

**No call lists.**

Consumer telephone privacy act, §§4-99-401 to 4-99-408.

**Notario or notario publico.**

Advertising services using terms.

Restrictions, §§4-109-101 to 4-109-105.

**CONSUMER PROTECTION —Cont'd****Pay per call**, §§4-98-101 to 4-98-105.**Penalties.**

Civil penalties, §4-88-113.

Unlawful practices, §4-88-103.

**Pet lemon law**, §4-97-105.**Price gouging during emergencies or disasters**, §§4-88-301 to 4-88-305.

Definitions, §4-88-302.

Penalties, remedies and enforcement, §4-88-304.

Preemption, §4-88-305.

Prohibited practices, §4-88-303.

Taking unfair advantage of consumers, §4-88-301.

**Private cause of action by persons suffering damage or injury**, §4-88-113.**Privity.**

Warranties.

Breach of warranty, §4-86-101.

**Products liability**, §4-86-102.**Pyramid schemes**, §4-88-109.**Sales.**

Breach of warranty liability, §4-86-101.

**School calendars.**

Disclosures by solicitors for advertisements on, §§4-88-501 to 4-88-503.

**Service contracts**, §§4-114-101 to 4-114-112.**Slamming in telecommunications industry**, §§4-88-401 to 4-88-403.**Statute of limitations**, §4-88-115.**Telephone.**

Pay per call, §§4-98-101 to 4-98-105.

**Trade secrets.**

Evidence held in camera, §4-88-111.

**Unlawful practices.**

Advertising.

Deceptive trade practices, §4-88-107.

Applicability of chapter, §4-88-101.

Concealment, suppression or omission of material facts, §4-88-108.

Deceptive trade practices, §4-88-107.

Fraud, §§4-88-107, 4-88-108.

Injunctions, §4-88-104.

Misdemeanors, §4-88-103.

Penalties, §4-88-103.

Pyramiding devices, §4-88-109.

**Unsolicited merchandise**, §4-86-103.**Voluntary compliance with provisions**, §4-88-114.**Warranties.**

Breach of warranty.

Liability, §4-86-101.

**CONSUMER PROTECTION —Cont'd****Warranties —Cont'd**

Breach of warranty —Cont'd

Privity, §4-86-101.

**Witnesses.**

Court order to appear, §4-88-112.

**CONTAINERS.****Charitable solicitation**, §§4-103-201 to 4-103-205.**CONTEMPT.****Consumer protection.**

Court orders for production of witnesses and evidence.

Disobedience of order, §4-88-112.

**CONTRACTS.****Assignments.**

Nonnegotiable instruments generally, §§4-58-101 to 4-58-110.

**Charitable organization with fund-raising counsel**, §4-28-405.**Charitable organization with paid solicitor**, §4-28-407.**Cigarettes and tobacco products.**

Unfair cigarette sales.

Contracts in violation of act void, §4-75-705.

**Construction contracts.**

Hold harmless clauses unenforceable, §4-56-104.

**Copyright royalty collection practices act**, §§4-76-101 to 4-76-108.**Corporations.**

Agency determinations.

Effect of certain contractual provisions, §4-25-107.

Dividends.

Restrictions on dividends, §4-26-621.

Stock and stockholders.

Effect of restrictions on contracts, §4-26-610.

**Credit services organizations.**

Cancellation.

Notice, §4-91-109.

Requirements, §4-91-109.

**Defenses.**

Unconscionability.

Sale of goods, §4-2-302.

**Documents of title.**

Bills of lading.

Limitation of carrier's liability, §4-7-309.

Warehouse receipts.

Limitation of warehouse's liability, §4-7-204.

When adequate compliance with obligations of commercial contract, §4-7-509.

**CONTRACTS —Cont'd****Fuel excise taxes imposed by federal law.**

Reimbursement required by contract provisions.

Option for reimbursement.

Exercise by reimbursing party, notice, §4-56-103.

**Fund-raising counsel.**

Contract with charitable organization, §4-28-405.

**Gas, diesel and aviation fuel excise taxes imposed by federal law.**

Reimbursement required by contract provisions.

Option for reimbursement.

Exercise by reimbursing party, notice, §4-56-103.

**Hold harmless clauses.**

Construction contracts, §4-56-104.

**Home security services contracts.**

Automatic renewal, §4-86-106.

**Home solicitation sales.**

Excepted contracts, §4-89-103.

**Interest.**

Maximum rate of interest by contract, §4-57-104.

**Limitation of actions.**

Sale of goods.

Breach of contracts, §4-2-725.

Limitations by agreements may be reduced to less than one year, §4-2-725.

**Limited liability companies.**

Liability of members, managers, agents, etc., §4-32-304.

**Monopolies and restraint of trade.**

Automobile dealer's anti-coercion act.

Voidness of contracts violating subchapter, §4-75-407.

Unfair practices.

No recovery on contract violating act, §4-75-206.

**Motor vehicles.**

Arbitration and forum selection clauses in sales contracts, §4-75-413.

Service contracts, §§4-90-501 to 4-90-512.

**Nonprofit corporations.**

Powers of corporations, §4-28-209.

**Nonprofit corporations (1993).**

Officers' rights, §4-33-844.

**Oil and gas.**

Petroleum products franchises.

Cancellation of contracts.

General provisions, §§4-72-401 to 4-72-503.

**CONTRACTS —Cont'd****Paid solicitor.**

Contract with charitable organization when soliciting contributions, §4-28-407.

**Parol evidence.**

Sale of goods, §4-2-202.

**Pets.**

Retail pet stores.

Written contract requirements, §4-97-105.

**Sale of goods, §§4-2-101 to 4-2-725.****Sales representatives.**

Payment in absence of contract.

Time limitation, §4-70-303.

Damages, attorney's fees and costs.

Failure to pay commission within time allowed, §4-70-306.

Sales representatives' contracts, §4-70-302.

Waiver of provisions of subchapter.

Prohibited, §4-70-305.

**Service contracts.**

Generally, §§4-114-101 to 4-114-112.

Motor vehicles, §§4-90-501 to 4-90-512.

**Solicitors.**

Paid solicitors.

Contract with charitable organization, soliciting contributions, §4-28-407.

**Statute of frauds, §§4-59-101 to 4-59-103.****Statute of limitations.**

Sale of goods.

Breach of contracts, §4-2-725.

Limitations by agreement may be reduced to less than one year, §4-2-725.

**Unconscionability.**

Sale of goods, §4-2-302.

**Waiver.**

Sale of goods.

Waiver of executory portion of contract, §4-2-209.

**CONTRIBUTION.****Negotiable instruments.**

Joint and several liability, §4-3-116.

**CONTRIBUTORY NEGLIGENCE.****Bank deposits and collections.**

Unauthorized signature or alteration, §4-4-406.

**Negotiable instruments.**

Forged signature or alteration of instrument, §4-3-406.

**CONVERSION.**

**Limited partnerships**, §§4-47-1101 to 4-47-1113.

**Negotiable instruments.**

Liability for conversion of instrument, §4-3-420.

**CONVERSION OF INSTITUTIONS.**

**Limited liability companies**, §§4-32-1201 to 4-32-1205.

**Partnerships**, §§4-46-901 to 4-46-913.

**CONVEYANCES.**

**Fraudulent conveyances**, §§4-59-201 to 4-59-213.

**Limited liability companies.**

Transfer of real property generally, §4-32-702.

**Nonprofit corporations.**

Powers of corporations, §4-28-209.

**COOPERATIVES.****Accounts and accounting.**

Books and records.

Inspection.

Right of inspection, §4-30-113.

**Administration of chapter**, §4-30-102.

**Articles of incorporation.**

Certified copy returned, §4-30-108.

Contents, §4-30-108.

Filing with secretary of state, §4-30-108.

**Associations.**

Organization, ownership control, etc., of other associations, §4-30-116.

**Authority to pass bylaws**, §4-30-109.

**Banks.**

Applicability of provisions, §4-30-202.

Commissioner in charge of noncomplying banks, §4-30-206.

Cumulative nature of subchapter, §4-30-203.

Declaration as investment companies, §4-30-207.

Definitions, §4-30-201.

Future incorporation of cooperative banks.

Prohibited, §4-30-204.

No further incorporation of cooperative banks, §4-30-204.

Noncomplying banks, §4-30-206.

Termination of corporate existence, §4-30-205.

**Benefits.**

Extension of benefits to established cooperatives only, §4-30-104.

**Board of directors.**

Election, §4-30-110.

Officers, §4-30-110.

**COOPERATIVES —Cont'd****Board of directors —Cont'd**

Removal, §4-30-110.

Term, §4-30-110.

**Books and records.**

Inspections.

Right of inspection, §4-30-113.

**Bylaws.**

Authority to pass, §4-30-109.

Required provisions, §4-30-109.

**Construction and interpretation**, §4-30-103.

**Banks.**

Applicability of subchapter, §4-30-202.

Cumulative nature of subchapter, §4-30-203.

**Contents of articles of incorporation**, §4-30-108.

**Cooperatives governed solely by act**, §4-30-104.

**Corporate title**, §4-30-106.

**Corporations.**

Organization, ownership control, etc., of other corporations, §4-30-116.

**Debts.**

Members not liable for debts of association, §4-30-117.

**Definitions**, §4-30-101.**Banks.**

Cooperative banks, §4-30-201.

**Federation of cooperative business enterprises.**

Authorized by chapter, §4-30-116.

**Fees.**

Payment to secretary of state, §4-30-108.

**Forms.**

Prescription of forms by secretary of state, §4-30-115.

**Inspections.**

Accounts and accounting.

Right of inspection of books and records, §4-30-113.

**Liability.**

Debts of association.

Members not liable for debts, §4-30-117.

Tort liability of cooperative, §4-30-118.

**Membership**, §4-30-107.

**Names.**

Title.

Corporate title, §4-30-106.

**Plan.**

Cooperative plan.

Defined, §4-30-101.

**Purpose of chapter**, §4-30-102.

**Purposes**, §4-30-107.

**COOPERATIVES —Cont'd****Receipts.**

Forms, §4-30-115.

**Reports.**

Annual reports required, §4-30-114.

**Requisites for doing business,**  
§4-30-111.**Secretary of state.**

Filing of articles of incorporation with secretary, §4-30-108.

Forms.

Prescription by secretary, §4-30-115.

Performance of duties under act,  
§4-30-105.

**Stock and stockholders.**

Ownership of stock in other corporations or associations,  
§4-30-116.

Payment for 20 percent of stock prerequisite for commencing business, §4-30-111.

Subscription of stock in other cooperative associations,  
§4-30-116.

Ten percent stock limit per person,  
§4-30-112.

Voting by members, §4-30-112.

**Subchapter T of internal revenue code of 1986.**

Authorized distributions by cooperative organized within meaning, §4-33-1302.

**Subscription of stock in other cooperative associations,**  
§4-30-116.**Termination of corporate existence,**  
§4-30-205.**Title.**

Corporate title, §4-30-106.

**Torts.**

Liability of cooperative for torts,  
§4-30-118.

**Transacting business.**

Requisites, §4-30-111.

**COPYRIGHTS.****Royalty collection practices act,**  
§§4-76-101 to 4-76-108.

Applicability of provisions, §4-76-108.

Collection of payments outside of contract, §4-76-105.

Definitions, §4-76-102.

Form of contract, §4-76-104.

Information to be made available prior to contracting, §4-76-103.

Injunction of violations, §4-76-107.

Prohibited practices, §4-76-106.

Short title, §4-76-101.

**CORPORATE FRANCHISE TAX.****Reports.**

Annual report for secretary of state,  
§4-27-1622.

**CORPORATIONS.****Actions.**

Derivative actions, §§4-26-714,  
4-27-740.

Stock and stockholders.

Provisions relating to actions by shareholders, §4-26-714.

Shareholders' right to dissent does not impair other legal actions,  
§4-26-713.

**Amendments.**

Articles of incorporation, §§4-26-301,  
4-26-302.

Articles of amendment, §§4-26-304,  
4-27-1006.

Authority to amend, §4-27-1001.

Before issuance of shares,  
§4-27-1005.

Board of directors, §4-27-1002.

Board of directors and shareholders,  
§4-27-1003.

Class voting, §§4-26-303, 4-27-1004.

Effect of amendment, §4-27-1009.

Filing of articles of amendment,  
§§4-26-305, 4-27-1006.

Reorganization proceedings,  
§§4-26-307, 4-27-1008.

Restatement of articles, §§4-26-306,  
4-27-1007.

**Bylaws.**

Board of directors or shareholders,  
§4-27-1020.

Increasing quorum or voting requirement for directors,  
§4-27-1022.

Increasing quorum or voting requirement for shareholders,  
§4-27-1021.

**Foreign corporations.**

Certificate of authority, §4-27-1504.

**Appeals.****Documents.**

Refusal to file document, §4-27-126.

**Secretary of state.**

Appeals from decisions, §§4-26-103,  
4-26-107.

**Articles of incorporation.**

Amendments, §§4-26-301, 4-26-302.

Articles of amendment, §§4-26-304,  
4-27-1006.

Authority to amend, §4-27-1001.

Before issuance of shares,  
§4-27-1005.

**CORPORATIONS —Cont'd****Articles of incorporation —Cont'd****Amendments —Cont'd**

Board of directors, §4-27-1002.

Board of directors and shareholders,  
§4-27-1003.

Class voting, §§4-26-303, 4-27-1004.

Effect of amendment, §4-27-1009.

Filing of articles of amendment,  
§§4-26-305, 4-27-1006.Reorganization proceedings,  
§§4-26-307, 4-27-1008.Restatement of articles, §§4-26-306,  
4-27-1007.Certificate that corporate existence  
has terminated, §4-26-207.

Contents, §§4-26-202, 4-27-202.

Defined, §§4-26-102, 4-27-140.

**Disapproval.**Appeal from secretary of state,  
§4-26-107.**Filing.**

Effect, §4-27-203.

When corporate existence begins,  
§4-27-203.

Restatement, §§4-26-306, 4-27-1007.

**Stock and stockholders.****Voting of shares.**Greater voting requirements may  
be provided for in articles,  
§§4-26-709, 4-27-727.**Assets.****Liquidation.**Jurisdiction of court to liquidate  
assets and business of  
corporation, §4-26-1108.**Mortgage of corporate assets.**

Corporate borrowing, §4-26-901.

Generally, §§4-26-901, 4-27-1201.

**Net assets.**

Defined, §4-26-102.

Rights of dissenting shareholders upon  
sale or exchange of assets,  
§4-26-904.

Definitions, §4-27-1301.

Demand of payment.

Duty, §4-27-1323.

Dissenters' notice, §4-27-1322.

Failure of corporation to take action,  
§4-27-1326.Judicial appraisal of shares,  
§4-27-1330.Court costs and counsel fees,  
§4-27-1331.Nominees and beneficial owners,  
§4-27-1303.Notice of dissenters' rights,  
§4-27-1320.**CORPORATIONS —Cont'd****Assets —Cont'd**Rights of dissenting shareholders upon  
sale or exchange of assets  
—Cont'dNotice of intent to demand payment,  
§4-27-1321.Payments to shareholders,  
§4-27-1325.

After-acquired shares, §4-27-1327.

Dissatisfaction with payment or  
offer, §4-27-1328.

Right of dissent, §4-27-1302.

Uncertificated shares, §4-27-1324.

Sale of assets in regular course of  
business, §§4-26-902, 4-27-1201.Sale or lease other than in regular  
course of business, §§4-26-903,  
4-27-1202.

Valuation, §4-26-616.

**Assumed names.**

Business under assumed name.

Exception to provisions, §4-70-201.

**Authorization of dissolution,**

§4-26-1101.

**Bankruptcy and insolvency.**

Definition of insolvent, §4-26-102.

**Benevolent corporations.**

Fees of secretary of state, §4-28-102.

**Bonds, surety.****Corporate security.**Issuance of certificates of deposit or  
securities in lieu of bond,  
§4-25-102.**Business corporation act.****Amendments.**Reservation of power to amend,  
§4-27-102.

Applicability of chapter, §4-26-103.

Citation of chapter, §§4-26-101,  
4-27-101.**Repeals.**Reservation of power to repeal,  
§4-27-102.Short title of chapter, §§4-26-101,  
4-27-101.**Bylaws.**

Adoption, §§4-26-809, 4-27-206.

**Amendments.**Board of directors or shareholders,  
§4-27-1020.Increasing quorum or voting  
requirement for directors,  
§4-27-1022.Increasing quorum or voting  
requirement for shareholders,  
§4-27-1021.

**CORPORATIONS —Cont'd****Bylaws —Cont'd**

Emergency bylaws, §§4-26-810,  
4-27-207.

**Certificates.**

Dissolution, §4-26-1102.

Existence, §4-27-128.

**Change of state of incorporation,**  
§4-25-109.**Charities.**

Gifts authorized, §4-25-103.

**Citation of act, §§4-26-101, 4-27-101.****Class actions.**

Derivative actions by shareholders,  
§§4-26-714, 4-27-740.

**Commencement of business.**

Requirements, §4-26-206.

When corporate existence begins,  
§4-27-203.

**Conflicts of interest.**

Directors, §4-27-831.

**Construction and interpretation.**

Applicability of chapter, §4-26-103.

Existing domestic corporations,  
§4-27-1701.

Qualified foreign corporations,  
§4-27-1702.

Savings provisions, §4-27-1703.

Effective date of act, §4-27-1706.

Fairs and associations of public  
nature, §4-28-101.

Severability of chapter, §4-27-1704.

**Contracts.**

Agency determinations.

Effect of certain contractual  
provisions, §4-25-107.

Dividends.

Restrictions on dividends, §4-26-621.

Stock and stockholders.

Effect of restrictions on contracts,  
§4-26-610.

**Contributions.**

Authorized, §4-25-103.

**Conversion.**

Action on plan of conversion,  
§§4-26-1003, 4-27-1103.

Approval, §§4-26-1003, 4-27-1103.

Articles of conversion, §§4-26-1004,  
4-27-1104.

Definitions, §4-27-1101.

Effect, §§4-26-1005, 4-27-1105.

Filings required, §§4-26-1004,  
4-27-1104.

Generally, §§4-26-1002, 4-27-1102.

Plan of conversion, §§4-26-1002,  
4-27-1102.

When effective, §4-26-1005.

**CORPORATIONS —Cont'd****Cooperative associations.**

General provisions, §§4-30-101 to  
4-30-118.

**Counties.**

Eligibility for corporation to receive  
county grant, §4-25-108.

**County clerk.**

Fees, §4-26-1203.

**Defenses.**

Ultra vires, §4-26-205.

**Definitions, §§4-26-102, 4-27-140.**

Preemptive rights, §4-26-711.

Surplus, net profits and valuation of  
assets, §4-26-616.

**Dental corporations, §§4-29-401 to**  
4-29-411.**Derivative actions.**

Shareholder actions, §§4-26-714,  
4-27-740.

**Directors.**

Action with or without meeting,  
§§4-26-807, 4-27-821.

Board of directors.

Executive committee, §4-26-808.

Meetings, §§4-26-805, 4-27-820.

Action with or without meeting,  
§§4-26-807, 4-27-821.

Required, §§4-26-801, 4-27-801.

Bylaws.

Adoption, §§4-26-809, 4-27-206.

Alteration, amendment or repeal,  
§4-26-809.

Emergency bylaws, §§4-26-810,  
4-27-207.

Classifications, §4-27-804.

Committees, §4-27-825.

Compensation, §4-27-811.

Conflicts of interest, §4-27-831.

Distributions.

Liability for unlawful distributions,  
§4-27-833.

Dividends.

General powers of board, §4-26-617.

Liability of directors, §4-26-811.

Share dividends.

Authority, §§4-26-618, 4-27-623.

Duties.

Generally, §4-27-801.

Election, §§4-26-802, 4-27-803.

Classes of shareholders, §4-27-804.

Voting for directors, §4-27-728.

Cumulative voting, §4-27-728.

Executive committee, §4-26-808.

Filling vacancies, §§4-26-803, 4-27-810.

Indemnification.

Authorization, §§4-26-814, 4-27-850.

**CORPORATIONS —Cont'd****Directors —Cont'd**

Liability of directors in certain cases,  
§4-26-811.

Loans, §4-27-832.

Meetings.

Action with or without meeting,  
§§4-26-807, 4-27-821.

Notice, §§4-26-805, 4-27-822.

Waiver, §4-27-823.

Place, §§4-26-805, 4-27-820.

Quorum, §§4-26-806, 4-27-824.

Notice.

Waiver, §4-26-105.

Number, §§4-26-802, 4-27-803.

Officers and agents.

Removal, §§4-26-813, 4-27-843.

Qualifications, §§4-26-801, 4-27-802.

Quorum, §§4-26-806, 4-27-824.

Removal, §4-26-804.

Judicial proceedings, §4-27-809.

Shareholders, §4-27-808.

Resignation, §4-27-807.

Standards of conduct.

Conflicts of interest, §4-27-831.

Generally, §4-27-830.

Loans to directors, §4-27-832.

Terms of directors, §§4-26-802,  
4-27-803, 4-27-805.

Staggered terms, §4-27-806.

Vacancies, §§4-26-803, 4-27-810.

Voting, §§4-26-801, 4-27-824.

**Dissolution.**

Administrative dissolution,

§§4-33-1420, 4-33-1421.

Effect, §4-27-1421.

Grounds, §4-27-1420.

Procedure, §4-27-1421.

Reinstatement following dissolution,  
§4-27-1422.

Appeal from denial of  
reinstatement, §4-27-1423.

Articles of dissolution, §4-27-1403.

Authorization, §4-26-1101.

Certificates, §4-26-1102.

Claims.

Filing or barring claims, §4-26-1105.

Known claims, §4-27-1406.

Unknown claims, §4-27-1407.

Corporate action and remedies after  
dissolution, §4-26-1104.

Deposit with state treasurer of amount  
due certain creditors or  
shareholders, §§4-26-1109,  
4-27-1440.

Directors and shareholders,  
§4-27-1402.

Effect, §4-27-1405.

**CORPORATIONS —Cont'd****Dissolution —Cont'd**

Incorporators or initial directors,  
§4-27-1401.

Involuntary dissolution, §4-26-1107.

Judicial dissolution, §§4-33-1430 to  
4-33-1433.

Custodianship, §4-27-1432.

Decree, §4-27-1433.

Grounds, §4-27-1430.

Procedure, §4-27-1431.

Receivership, §4-27-1432.

Notice to creditors, §4-26-1105.

Procedure after dissolution,  
§4-26-1103.

Revocation, §4-27-1404.

**Distributions.**

Directors.

Liability for unlawful distributions,  
§4-27-833.

Shareholders, §4-27-640.

**Dividends.**

Accrued preferential dividends.

Defined, §4-26-102.

Contractual restriction on dividends,  
§4-26-621.

Directors.

General powers of board, §4-26-617.

Liability of directors, §4-26-811.

Share dividends.

Authority, §§4-26-618, 4-27-623.

Fairs and associations of public  
nature.

Prohibited, §4-28-101.

Share dividends, §§4-26-618, 4-27-623.

Source, §4-26-619.

Surplus.

Source of dividends, §4-26-619.

**Documents.**

Effective time and date, §4-27-123.

Filing, §§4-26-1201, 4-27-120.

Appeal from refusal to file,  
§4-27-126.

Correcting filed document,  
§4-27-124.

Duty of secretary of state, §4-27-125.

Evidentiary effect of copy, §4-27-127.

Forms, §4-27-121.

Signing of false documents.

Penalties, §4-27-129.

**Education.**

Gifts authorized, §4-25-103.

**Emergency bylaws**, §§4-26-810,  
4-27-207.

**Emergency powers**, §4-27-303.

**Employees.**

Indemnification.

Authorization, §§4-26-814, 4-27-850.

**CORPORATIONS —Cont'd****Evidence.**

Certificates of secretary of state to be received in evidence, §4-26-106.

**Documents.**

Evidentiary effect of copy of filed document, §4-27-127.

**Executive committee, §4-26-808.****Expenses.**

Stock and stockholders.

Organization, reorganization and financing, §4-26-606.

**Fairs and associations of public nature.**

Construction and interpretation, §4-28-101.

**Dividends.**

Prohibited, §4-28-101.

Formation, §4-28-101.

Incorporation, §4-28-101.

Stock and stockholders, §4-28-101.

**Fees.**

County clerk, §4-26-1203.

Mutual corporations, §§4-26-1203, 4-26-1204.

**Secretary of state.**

Business corporations, §§4-26-1202, 4-27-122, 4-27-1705.

Nonprofit organizations, §§4-28-102, 4-28-223.

**Fictitious names.**

Notice to registrant regarding use, §4-27-406.

Use, §§4-26-405, 4-27-404.

**Formation.****Articles of incorporation.**

Amendments, §§4-26-301, 4-26-302.

Articles of amendment, §§4-26-304, 4-27-1006.

Authority to amend, §4-27-1001.

Before issuance of shares, §4-27-1005.

Board of directors, §4-27-1002.

Board of directors and shareholders, §4-27-1003.

Class voting, §§4-26-303, 4-27-1004.

Effect of amendment, §4-27-1009.

Filing of articles of amendment, §§4-26-305, 4-27-1007.

Reorganization proceedings, §§4-26-307, 4-27-1008.

Certificate that corporate existence has terminated, §4-26-207.

Contents, §§4-26-202, 4-27-202.

Restatement, §§4-26-306, 4-27-1007.

Certificate of existence, §4-27-128.

**CORPORATIONS —Cont'd****Formation —Cont'd**

Certificate that corporate existence has terminated, §4-26-207.

Fairs and associations of public nature, §4-28-101.

**Incorporators.**

Qualifications, §§4-26-201, 4-27-201.

Organization meeting of incorporators, §§4-26-203, 4-27-205.

Requirements before commencing business, §4-26-206.

**Forms.**

Documents, §4-27-121.

**General powers, §§4-26-204, 4-27-304.****Gifts.**

Authorized, §4-25-103.

**Grandfather clause.**

Preexisting corporation authorized to do business, §4-25-106.

**Habilitative services corporations, §§4-34-102 to 4-34-107.****Incorporation.**

Change of state of incorporation, §4-25-109.

Fairs and associations of public nature, §4-28-101.

**Incorporators.**

Organizational meeting, §§4-26-203, 4-27-205.

Qualifications, §§4-26-201, 4-27-201.

**Indemnification.**

Officers, directors, employees and agents.

Requirements as to, §§4-26-814, 4-27-850.

**Injunctions.****Names.**

Use of unlawful name, §§4-26-406, 4-27-405.

**Insolvent corporations.**

Defined, §4-26-102.

**Investment companies.****Stock and stockholders.**

Annual meeting, §4-27-701.

Authorized shares, §4-27-601.

Distributions to shareholders, §4-27-640.

**Investment securities, §§4-8-101 to 4-8-603.****Involuntary dissolution, §4-26-1107.****Joint tenants and tenants in common.****Stock certificates.**

Authority to hold in joint tenancy, §4-25-105.

**Judicial dissolution, §§4-33-1430 to 4-33-1433.**

**CORPORATIONS —Cont'd****Jurisdiction.**

## Liquidation.

Jurisdiction of court to liquidate assets and business of corporation, §4-26-1108.

Jurisdiction of court to supervise liquidation, §4-26-1106.

**Liability.**

Directors, §4-26-811.

Unlawful distributions, §4-27-833.

Preincorporation transactions, §4-27-204.

Stock and stockholders.

Subscribers and shareholders, §§4-26-716, 4-27-622.

**Limited liability companies**

generally, §§4-32-101 to 4-32-1316.

**Liquidation.**

Deposit with state treasurer of amount due certain creditors or shareholders, §§4-26-1109, 4-27-1440.

Distributions in partial liquidation, §4-26-620.

Contractual restriction, §4-26-621.

Jurisdiction of court to liquidate assets and business of corporation, §4-26-1108.

Jurisdiction of court to supervise liquidation, §4-26-1106.

**Literature.**

Religious literary benevolent, etc., corporations. •

Fees of secretary of state, §4-28-102.

**Loans.**

Directors.

Loans to directors, §4-27-832.

**Medical corporations**, §§4-29-301 to 4-29-312.

**Meetings.**

Books and records.

Keeping of minutes, books and records, §§4-26-715, 4-27-1601.

Directors.

Action with or without meeting, §4-26-807.

Place and notice, §§4-26-805, 4-27-820, 4-27-822.

Waiver of notice, §4-27-823.

Quorum, §§4-26-806, 4-27-824.

Organization meeting of incorporators, §§4-26-203, 4-27-205.

**Merger.**

Approval of plan, §§4-26-1007, 4-27-1107.

Articles of merger, §§4-26-1009, 4-27-1109.

**CORPORATIONS —Cont'd****Merger —Cont'd**

Definitions, §§4-26-1001, 4-27-1101.

Effect, §§4-26-1010, 4-27-1110.

Filings required, §§4-26-1009, 4-27-1109.

Foreign organizations, §4-26-1010.

Generally, §§4-26-1006, 4-27-1106.

Plan, §§4-26-1006, 4-27-1106.

Action on plan, §§4-26-1007, 4-27-1107.

Rights of dissenting shareholders in mergers or consolidations.

Definitions, §4-27-1301.

Demand of payment.

Duty to demand, §4-27-1323.

Dissenters' notice, §4-27-1322.

Failure of corporation to take action, §4-27-1326.

Generally, §4-26-1011.

Judicial appraisal of shares, §4-27-1330.

Costs and fees, §4-27-1331.

Nominees and beneficial owners, §4-27-1303.

Notice of dissenters' rights, §4-27-1320.

Notice of intent to demand payment, §4-27-1321.

Payments to shareholders, §4-27-1325.

After-acquired shares, §4-27-1327.

Dissatisfaction with payment or offer, §4-27-1328.

Right of dissent, §4-27-1302.

Uncertificated shares, §4-27-1324.

Subsidiary merger by parent, §§4-26-1008, 4-27-1108.

Supplemental nature of provisions, §§4-26-1012, 4-27-1111.

**Monopolies and restraint of trade.**

Unfair practices.

Forfeiture of charter, §4-75-205.

Officers, directors, agents and employees, §§4-75-209, 4-75-210.

**Mutual corporations.**

Fees, §4-26-1204.

**Names.**

Corporate name.

Domestic corporations, §§4-26-401, 4-27-401.

Foreign corporations, §§4-26-401, 4-27-401, 4-27-1506.

Fictitious names.

Notice to registrant regarding use, §4-27-406.

Use, §§4-26-405, 4-27-404.

**CORPORATIONS —Cont'd****Names —Cont'd**

- Injunction against use of unlawful name, §§4-26-406, 4-27-405.
- Registered name, §§4-26-403, 4-27-403.
- Notice to registrant regarding use, §4-27-406.
- Renewal, §§4-26-404, 4-27-403.
- Reserved name, §§4-26-402, 4-27-402.

**Net profits.**

- Defined, §4-26-616.

**Notice.**

- Directors.
- Meetings, §§4-26-805, 4-27-822.
- Waiver, §4-27-823.
- Dissolution.
- Creditors to be notified, §4-26-1105.
- Forms, §4-27-141.
- Stock and stockholders.
- Meetings, §§4-26-703, 4-27-705.
- Waiver, §4-27-706.
- Waiver of notice, §4-26-105.

**Officers and agents.**

- Authority, §4-26-812.
- Contractual provisions.
- Effect of certain provisions upon determination of agency, §4-25-107.
- Determination of agency.
- Effect of certain contract provisions, §4-25-107.
- Duties of officers.
- Generally, §4-27-841.
- Foreign corporations.
- Service of process.
- Secretary of state as agent for service, §4-27-205.
- Indemnification.
- Authorization, §§4-26-814, 4-27-850.
- Removal, §§4-26-813, 4-27-843.
- Effect on contract rights, §4-27-844.
- Required officers, §§4-26-812, 4-27-840.
- Resignation, §§4-25-101, 4-27-843.
- Standards of conduct.
- Officers, §4-27-842.

**Penalties.**

- Documents.
- Signing of false documents, §4-27-129.

**Personal property.**

- Defense of ultra vires, §4-26-205.

**Powers.**

- Emergency powers, §4-27-303.
- Generally, §§4-26-204, 4-27-302.
- Right of corporation to acquire and dispose of shares, §§4-26-611, 4-27-631.

**CORPORATIONS —Cont'd****Preemptive rights.**

- Defined, §4-26-711.
- Shares without preemptive rights.
- Corporate powers and limitations, §4-26-712.

**Preexisting corporations.**

- Authorization to do business in state, §4-25-106.

**Principal place of business.**

- Defined, §4-26-102.

**Professional corporations, §§4-29-201 to 4-29-213.****Purposes, §4-27-301.****Real property.**

- Defense of ultra vires, §4-26-205.

**Records.**

- Effective time and date of documents, §4-27-123.
- Fees, §4-27-122.
- Filing of corporate documents, §§4-26-1201, 4-27-120.
- Appeal from refusal to file, §4-27-126.
- Correcting filed document, §4-27-124.
- Duty of secretary of state, §4-27-125.
- Evidentiary effect of copy, §4-27-127.
- Forms, §4-27-121.
- Inspections.
- Court-ordered inspection, §4-27-1604.
- Stock and stockholders.
- Scope of inspection rights, §4-27-1603.
- Keeping.
- Requirements generally, §§4-26-715, 4-27-1601.
- Maintenance, §4-27-1601.
- Signing of false documents.
- Penalties, §4-27-129.
- Stock and stockholders.
- Closing of transfer books and fixing record date, §§4-26-702, 4-27-707.
- Inspection, §4-27-1602.

**Redemption.**

- Stock and stockholders.
- Cancellation of redeemable shares by redemption or purchase, §4-26-614.
- Reduction of stated capital in certain cases, §4-26-615.
- Restriction on redemption or purchase of redeemable shares, §4-26-613.

**Registered agent.**

- Model registered agents act, §§4-20-101 to 4-20-118.

**CORPORATIONS** —Cont'd**Registered agent** —Cont'd

Resignation, §4-25-101.

**Registered name**, §§4-26-403, 4-27-403.Notice to registrant regarding use,  
§4-27-406.

Renewal, §§4-26-404, 4-27-403.

**Rehabilitative services corporations**,  
§§4-34-101 to 4-34-107.**Religious corporations.**

Fees of secretary of state, §4-28-102.

**Remedies.**

Dissolution.

Corporate action and remedies after  
dissolution, §4-26-1104.**Removal of directors**, §4-26-804.

Judicial proceedings, §4-27-809.

Shareholders, §4-27-808.

**Removal of officers**, §§4-26-813,  
4-27-843.

Effect on contract rights, §4-27-844.

**Renewal of registered name**,  
§§4-26-404, 4-27-403.**Reorganization.**

Articles of incorporation.

Amendment, §§4-26-307, 4-27-1008.

**Reports.**

Franchise tax report.

Annual report to secretary of state,  
§4-27-1622.

Stock and stockholders.

Financial statements for  
shareholders, §4-27-1620.Other reports to shareholders,  
§4-27-1621.**Reserved name**, §§4-26-402, 4-27-402.Notice to registrant regarding use,  
§4-27-406.**Resignation of agents**, §4-25-101.**Restatement of articles of****incorporation**, §§4-26-306,  
4-27-1007.**Rural fire protection corporations**,  
§§4-34-103 to 4-34-107.**Savings clause.**Preexisting corporations authorized to  
do business, §4-25-106.**Secretary of state.**Appeals from secretary of state,  
§4-26-107.Certificates of secretary of state to be  
received in evidence, §4-26-106.

Duties.

Generally, §4-27-130.

Fees.

Business corporations, §§4-26-1202,  
4-27-122, 4-27-1705.**CORPORATIONS** —Cont'd**Secretary of state** —Cont'd

Fees —Cont'd

Nonprofit organizations, §§4-28-102,  
4-28-223.

Filing of documents.

Duties, §4-27-125.

Powers, §4-26-104.

Generally, §4-27-130.

Religious, literary, benevolent, etc.,  
corporations.

Fees of secretary of state, §4-28-102.

**Service of process.**

Foreign corporations.

Registered agents, §4-27-1510.

Required, §4-27-1510.

Registered agents.

Foreign corporations, §4-27-1510.

**Share exchange**, §§4-27-1801 to  
4-27-1804.

Approval of plan, §4-27-1802.

Articles of exchange, §4-27-1803.

Authorized, §4-27-1801.

Effect, §4-27-1804.

Plan of exchange, §4-27-1801.

Action on plan, §4-27-1802.

Rights of dissenting shareholders in  
share exchanges, §4-27-1301.

Right of dissent, §4-27-1302.

**Short title**, §§4-26-101, 4-27-101.**Signatures.**

Stock and stockholders.

Certificates representing shares.

Signed certificates, §§4-26-608,  
4-27-625.**Stated capital.**

Stock and stockholders.

Determination, §4-26-607.

Purchase by corporation of own  
shares out of stated capital,  
§§4-26-611, 4-27-631.Reduction of stated capital,  
§4-26-615.**Stock and stockholders.**

Actions.

Provisions relating to actions by  
shareholders, §4-26-714.

Shareholders' right to dissent.

Effect upon legal actions,  
§4-26-713.Single and multiple voting groups,  
§4-27-726.Without a meeting, §§4-26-710,  
4-27-704.

Amendments.

Class voting, §§4-26-303, 4-27-1004.

Applicability of act, §4-26-707.

**CORPORATIONS —Cont'd****Stock and stockholders —Cont'd**

Articles of incorporation.

Voting of shares.

Greater voting requirements may be provided for in articles, §§4-26-709, 4-27-727.

Assets.

Rights of dissenting shareholders upon sale or exchange of assets, §4-26-904.

Definitions, §4-27-1301.

Demand of payment.

Duty to demand, §4-27-1323.

Dissenters' notice, §4-27-1322.

Failure of corporation to take action, §4-27-1326.

Judicial appraisal of shares, §4-27-1330.

Costs and fees, §4-27-1331.

Nominees and beneficial owners, §4-27-1303.

Notice of dissenters' rights, §4-27-1320.

Notice of intent to demand payment, §4-27-1321.

Payments to shareholders, §4-27-1325.

After-acquired shares, §4-27-1327.

Dissatisfaction with payment or offer, §4-27-1328.

Right of dissent, §4-27-1302.

Uncertificated shares, §4-27-1324.

Valuation of assets, §4-26-616.

Authorized shares, §§4-26-601, 4-27-601.

Defined, §4-26-102.

Cancellation of shares.

Redeemable shares, §4-26-614.

Treasury shares, §§4-26-612, 4-27-140.

Certificates representing shares generally, §§4-26-608, 4-27-625.

Class voting of stock.

Generally, §4-26-707.

Two-thirds majority of those present or represented required, §4-26-707.

Amendment of certificates to show compliance with two-thirds majority requirement, §4-26-707.

Closing of transfer books, §§4-26-702, 4-27-707.

Consent to corporate action, §4-26-708.

Consideration for shares, §§4-26-604, 4-27-621.

**CORPORATIONS —Cont'd****Stock and stockholders —Cont'd**

Contracts.

Effect of restrictions upon contracts, §4-26-610.

Conversions or exchanges of shares.

Consideration, §4-26-604.

Creation.

Authorized, §§4-26-601, 4-27-601.

Defense of ultra vires, §§4-26-205, 4-27-304.

Derivative proceedings, §§4-26-714, 4-27-740.

Determination of amount of stated capital, §4-26-607.

Dissent.

Shareholders' right to dissent does not impair other legal actions, §4-26-713.

Distributions to shareholders, §4-27-640.

Dividends.

Accrued preferential dividends.

Defined, §4-26-102.

Contractual restriction on dividends, §4-26-621.

Directors.

Authority, §4-26-617.

Liability of directors, §4-26-811.

Fairs and associations of public nature.

Prohibition on dividends, §4-28-101.

Share dividends.

Directors.

Authority, §§4-26-618, 4-27-623.

Source, §4-26-619.

Expenses.

Organization, reorganization and financing, §4-26-606.

Fairs and associations of public nature, §4-28-101.

Financing.

Expenses, §4-26-606.

Fixing record date, §§4-26-702, 4-27-707.

Fractional shares, §4-27-604.

Issuance, §§4-26-609, 4-27-604.

Investment companies.

Annual meeting, §4-27-701.

Authorized shares, §4-27-601.

Distributions to shareholders, §4-27-640.

Issuance.

Authorized, §§4-26-601, 4-27-601.

Consideration, §4-27-621.

Expenses, §4-27-628.

**CORPORATIONS —Cont'd****Stock and stockholders —Cont'd**

## Issuance —Cont'd

Fractional shares or scrip,  
§§4-26-609, 4-27-604.

Preferred or special classes in series,  
§§4-26-602, 4-27-602.

Issued shares, §4-27-603.

Joint tenants and tenants in common.

Certificates, §4-25-105.

## Liability.

Shareholders, §§4-26-716, 4-27-622.

Subscribers, §4-26-716.

## Liquidation.

Distributions in partial liquidation,  
§4-26-620.

Contractual restrictions,  
§4-26-621.

Meetings of shareholders, §§4-26-701,  
4-27-701.

Action by shareholders without  
meeting, §§4-26-710, 4-27-704.

Action by single and multiple voting  
groups, §4-27-726.

Adjournment, §4-26-705.

Class voting of stock, §4-26-707.

Closing of transfer books and fixing  
record date, §§4-26-702,  
4-27-707.

Court-ordered meetings, §4-27-703.

## Directors.

Removal of directors, §4-27-808.

Meeting to remove, §4-26-804.

Notice, §4-26-703.

Waiver, §4-27-706.

Proxies, §4-27-722.

Quorum, §4-26-705.

Quorum for voting groups,  
§4-27-725.

Record of meeting, §§4-26-715,  
4-27-1601.

Special meetings, §§4-26-701,  
4-27-702.

Voting list, §§4-26-704, 4-27-720.

Voting of shares, §§4-26-708,  
4-27-721.

Acceptance of votes by  
corporation, §4-27-724.

Action by single and multiple  
voting groups, §4-27-726.

Agreements, §4-27-731.

Greater voting requirements.

Articles of incorporation may  
require, §§4-26-709,  
4-27-727.

Proxies, §4-27-722.

Quorum for voting groups,  
§4-27-725.

**CORPORATIONS —Cont'd****Stock and stockholders —Cont'd**

## Meetings of shareholders —Cont'd

## Voting of shares —Cont'd

Requirements for voting groups,  
§4-27-725.

Shares held by nominees,  
§4-27-723.

Trusts, §4-27-730.

Voting for directors, §4-27-728.

Voting trusts, §§4-26-706, 4-27-730.

## Merger.

Rights of dissenting shareholders in  
mergers or consolidations,  
§4-26-1007.

Definitions, §4-27-1301.

Demand of payment.

Duty to demand, §4-27-1323.

Dissenters' notice, §4-27-1322.

Failure of corporation to take  
action, §4-27-1326.

Judicial appraisal of shares,  
§4-27-1330.

Costs and fees, §4-27-1331.

Nominees and beneficial owners,  
§4-27-1303.

Notice of dissenters' rights,  
§4-27-1320.

Notice of intent to demand  
payment, §4-27-1321.

Payments to shareholders,  
§4-27-1325.

After-acquired shares,  
§4-27-1327.

Dissatisfaction with payment or  
offer, §4-27-1328.

Right of dissent, §4-27-1302.

Uncertificated shares, §4-27-1324.

Method of payment for shares,  
§4-26-605.

## Non-par stock.

Allocation to surplus in sales,  
§4-26-607.

Consideration, §4-26-604.

## Notice.

Shareholders' meetings, §§4-26-703,  
4-27-705.

Waiver, §4-27-706.

Waiver of notice, §4-26-105.

Number of shareholders, §4-27-142.

## Options.

Share options, §4-27-624.

## Organization.

Expenses, §4-26-606.

Outstanding shares, §4-27-603.

## Par value.

Consideration for shares, §4-26-604.

**CORPORATIONS —Cont'd****Stock and stockholders —Cont'd**

Payment for shares, §4-26-605.

No shares issued until full amount paid, §4-26-605.

Preemptive rights, §§4-26-711, 4-27-630.

Corporate powers and restrictions as to shares not having preemptive rights, §4-26-712.

Preferred or special classes.

Approved preferential dividends.

Defined, §4-26-102.

Authorized shares generally, §§4-26-602, 4-27-602.

Profits.

Net profits.

Determination, §4-26-616.

Purchase by corporation of own shares.

Authorization and procedure, §§4-26-611, 4-27-631.

Records.

Inspection by shareholders, §4-27-1602.

Scope of inspection rights, §4-27-1603.

Redemption.

Cancellation of redeemable shares by redemption or purchase, §4-26-614.

Restriction on redemption or purchase of redeemable shares, §4-26-613.

Reduction of stated capital in certain cases, §4-26-615.

Reorganization.

Expenses, §4-26-606.

Reports.

Financial statements for shareholders, §4-27-1620.

Other reports to shareholders, §4-27-1621.

Restrictions upon transfer of shares, §§4-26-610, 4-27-627.

Right of corporation to acquire and dispose of its own shares, §§4-26-611, 4-27-631.

Rights.

Shareholders' preemptive rights, §§4-26-711, 4-27-630.

Scrip, §4-27-604.

Shareholders.

Defined, §4-27-142.

Share options, §4-27-624.

Shares and shareholders.

Defined, §4-26-102.

Shares without certificates, §4-27-626.

**CORPORATIONS —Cont'd****Stock and stockholders —Cont'd**

Signatures.

Certificates representing shares.

Signed certificates, §§4-26-608, 4-27-625.

Stated capital.

Determination, §4-26-607.

Purchase by corporation of own shares out of stated capital, §4-26-611.

Reduction of stated capital, §4-26-615.

Subscriber.

Defined, §§4-26-102, 4-27-140.

Subscriptions, §4-26-603.

Preincorporation, §4-27-620.

Surplus.

Capital surplus.

Composition, §4-26-616.

Determination, §4-26-607.

Dividends.

Source of dividends, §4-26-619.

Purchase by corporation of own shares out of capital surplus, §4-26-611.

Earned surplus.

Composition, §4-26-616.

Determination, §4-26-607.

Dividends.

Source of dividends, §4-26-619.

Purchase by corporation of own shares out of earned surplus, §4-26-611.

Transfer books.

Closing, §§4-26-702, 4-27-707.

Transfer of shares.

Restrictions upon, §§4-26-610, 4-27-627.

Treasury shares.

Cancellation, §4-26-612.

Consideration, §4-26-604.

Defined, §4-26-102.

Voting list, §§4-26-704, 4-27-720.

Voting of shares, §§4-26-708, 4-27-721.

Action by single and multiple voting groups, §4-27-726.

Agreements, §4-27-731.

Greater voting requirements.

Articles of incorporation may provide for greater voting requirements, §§4-26-709, 4-27-727.

Requirements for voting groups, §4-27-725.

Trusts, §4-27-730.

Voting for directors, §4-27-728.

Cumulative voting, §4-27-728.

**CORPORATIONS —Cont'd****Stock and stockholders —Cont'd**

Voting trusts, §§4-26-706, 4-27-730.

**Subscriptions.**

Definitions, §4-26-102.

Liability of subscribers and shareholders, §4-26-716.

Stock and stockholders.

Preincorporation subscriptions, §4-27-620.

Subscriptions for shares, §4-26-603.

**Subsidiaries.**

Merger of subsidiary by parent, §§4-26-1008, 4-26-1009, 4-27-1104, 4-27-1108.

**Surplus.**

Capital surplus.

Composition, §4-26-616.

Determination, §4-26-607.

Dividends.

Source of dividends, §4-26-619.

Purchase by corporation of own shares out of capital surplus, §4-26-611.

Defined, §§4-26-102, 4-26-616.

Dividends.

Source of dividends, §4-26-619.

Earned surplus.

Composition, §4-26-616.

Determination, §4-26-607.

Dividends.

Source of dividends, §4-26-619.

Purchase by corporation of own shares out of earned surplus, §4-26-611.

**Tax pass throughs.**

Small business entity tax pass throughs.

Limited liability companies generally, §§4-32-101 to 4-32-1316.

**Treasury shares.**

Cancellation, §4-26-612.

Consideration, §4-26-604.

Defined, §4-26-102.

**Ultra vires.**

Defense, §§4-26-205, 4-27-304.

**Waiver.**

Notice, §4-26-105.

**Warning orders.**

Dissolution.

Involuntary dissolution, §4-26-1107.

**COSTS.**

Lemon law, §4-90-415.

**Limited partnerships.**

Derivative actions, §4-47-1005.

**Odometer tampering, action for,** §4-90-207.

**COSTS —Cont'd****Pay per call.**

Consumer remedies, §4-98-105.

**Sales representatives.**

Noncompliance with provisions relating to payment of commission, §4-70-306.

**Unincorporated nonprofit associations.**

Actions involving association.

Reimbursement or payment of expenses, fees and costs, §4-28-627.

**COUNTIES.****Corporations.**

Eligibility for corporation to receive county grant, §4-25-108.

**COUNTY CLERKS.****Corporations.**

Fees, §4-26-1203.

**COURSE OF DEALING.**

**Commercial code,** §4-1-303.

**Sale of goods, UCC.**

Implied warranties, §4-2-314.

**COURSE OF PERFORMANCE.**

**Commercial code,** §4-1-303.

**COVER.****Leases under UCC.**

Cover by lessor, §4-2A-518.

**Sales under UCC.**

Buyer's procurement of substitute goods, §4-2-712.

**CREDIT CARDS.****Account numbers.**

Printing numbers on receipts, §4-107-303.

Credit card defined, §4-107-302.

Legislative findings, §4-107-301.

**College campus, solicitations on**

**campus,** §§4-104-201 to 4-104-204.

Athletic events, solicitations at.

Credit seminar within institutions freshman orientation, §4-104-203.

Definitions, §4-104-201.

Face-to-face solicitations, §4-104-202.

Fine for violation, §4-104-204.

Misdemeanor for violation, §4-104-204.

Personal solicitation of credit card application, §4-104-202.

**Factoring,** §§4-59-501 to 4-59-503.**Financial transaction cards.**

Records of sale, §§4-59-501 to 4-59-503.

**CREDIT CARDS —Cont'd  
Numbers.**

Consumer protection against computer spyware act, §§4-111-101 to 4-111-105.

Personally identifiable information defined, §4-111-102.

Personal information protection act, §§4-110-101 to 4-110-108.

**Printing card numbers on receipts,**  
§4-107-303.

Credit card defined, §4-107-302.

Legislative findings, §4-107-301.

**Processing services,** §§4-115-101 to 4-115-103.

Disclosures required, §4-115-101.

Exclusion from provisions, §4-115-103.

Penalty for violations, §4-115-102.

**Transfer of card balance from one card account to another,**  
§§4-107-201 to 4-107-204.

Cardholder protection, §4-107-202.

Definitions, §4-107-201.

Interest or other fees.

Applicability, §4-107-204.

Deceptive trade practice, violations, §4-107-203.

Remedies and penalties, §4-107-203.

Restrictions on charging cardholder, §4-107-202.

**CREDIT REPAIR COMPANIES,**  
§§4-91-101 to 4-91-109.**CREDIT REPORTING  
DISCLOSURES,** §§4-93-101 to 4-93-104.**Citation of chapter.**

Title, §4-93-101.

**Damages.**

Notice of adverse action.

Failure to provide, §4-93-104.

**Definitions,** §4-93-102.**Denial of credit, etc.**

Notice of adverse action.

Contents of notice, §4-93-103.

Damages for failure to provide notice, §4-93-104.

Responsibility of user of consumer report, §4-93-103.

**Notice.**

Denial of credit, further extension or increase in limits of existing credit.

Contents of notice of adverse action, §4-93-104.

**CREDIT REPORTING  
DISCLOSURES —Cont'd****Notice —Cont'd**

Denial of credit, further extension or increase in limits of existing credit —Cont'd

Responsibility of user of consumer report to notify consumer of adverse action, §4-93-103.

Damages for failure to provide notification, §4-93-104.

**Title of chapter,** §4-93-101.**CREDIT REPORT SECURITY  
FREEZES,** §§4-112-101 to 4-112-114.**Access to report while freeze in place,** §4-112-104.**Action for noncompliance,**  
§4-112-112.**Advising third party of existence of security freeze,** §4-112-114.**Changes while freeze in place.**  
Written confirmation required,  
§4-112-109.**Confirmation of placement,**  
§4-112-103.**Definitions,** §4-112-102.**Enforcement of provisions,**  
§4-112-113.**Entities not required to place freeze,**  
§4-112-110.**Exclusions from provisions,**  
§4-112-107.**Fees charged by agency,** §4-112-108.**Notice of rights,** §4-112-111.**Notice of unauthorized access,**  
§4-112-104.**Placement by agency,** §4-112-103.**Remedies available to attorney general,** §4-112-113.**Removal of freeze,** §4-112-105.

Consumer request for, §4-112-106.

**Request by consumer.**

Placement, §4-112-103.

Removal, §4-112-106.

**Temporary lift on freeze,** §§4-112-104, 4-112-105.**Third party request for access while in place,** §4-112-105.**Title of provisions,** §4-112-101.**CRIMINAL LAW AND PROCEDURE.****Bills of lading.**

False statements, §4-59-302.

Issuance for goods not received, §4-59-301.

**CRIMINAL LAW AND PROCEDURE**

—Cont'd

**Bills of lading** —Cont'd

Negotiation of bill for unowned goods,  
§4-59-306.

**Collection practices.**

Telephone solicitations, §4-99-202.

**Conspiracy.**

Monopolies and restraint of trade.

Fixing prices of quantity of products.  
Prohibited, §4-75-309.

Lawful commerce excepted,  
§4-75-303.

**Credit cards.**

Factoring, §4-59-503.

Solicitation on college campus,  
§4-104-204.

**Diamonds.**

Sale of fracture-filled and  
clarity-enhanced diamonds,  
§4-101-201.

**Electronic mail.**

Unsolicited commercial and sexually  
explicit electronic mail, §4-88-605.

**Jewelers.**

Sale of fracture-filled and  
clarity-enhanced diamonds,  
§4-101-201.

**Odometer violations,** §4-90-203.**Oil and gas.**

Quality specifications for engine fuels,  
petroleum products and  
automotive lubricants, §4-108-209.

**Price gouging during emergencies,**  
§4-88-304.**Prizes.**

Telephone offer of prize to consumer.  
Dispatching courier to consumer's  
home to collect fees or costs  
prohibited, §4-99-202.

**Secured transactions.**

Security interests in certain farm  
products, §4-56-102.

**Spam.**

Unsolicited commercial and sexually  
explicit electronic mail, §4-88-605.

**Telecommunications.**

Telephone sellers.

Collection practices, §4-99-202.

**Unsolicited commercial and sexually  
explicit electronic mail,**  
§4-88-605.**Warehouse receipts.**

Delivering goods without obtaining  
negotiable receipt, §4-59-405.

Fraudulent issuance.  
Containing false statement,  
§4-59-402.

**CRIMINAL LAW AND PROCEDURE**

—Cont'd

**Warehouse receipts** —Cont'd

Issuance without statement of  
ownership, §4-59-404.

Negotiation of receipt by depositor of  
encumbered goods without  
disclosing facts, §4-59-406.

**Weights and measures.**

Fruit and other merchantable  
commodities.

Packing, selling, pledging, etc., with  
fraudulent intent, §4-18-330.

**CROPS.****Contracts.**

Sale of goods.

Definition of "goods," §4-2-105.

**Documents of title.**

Warehouse receipts.

Storage under government bond,  
§4-7-201.

**Liens.**

Secured transactions.

Agricultural liens generally,  
§§4-9-101 to 4-9-709.

**Secured transactions.**

Agricultural liens generally, §§4-9-101  
to 4-9-709.

**Warehouse receipts.**

Storage under government bond,  
§4-7-201.

**CRUELTY TO ANIMALS.****Retail pet stores.**

General provisions, §§4-97-101 to  
4-97-109.

Posting of public notice, §4-97-108.

Failure to post public notice as  
misdemeanor, §4-97-108.

**CUSTODIANS.****Nonprofit corporations (1993).**

Judicial dissolution, §4-33-1432.

**D****DAMAGES.****Bills of lading.**

Limitations of liability in bill of lading,  
§4-7-309.

**Carriers.**

Limitation of liability.

Carrier issuing bill of lading,  
§4-7-309.

**Cigarettes and tobacco products.**

Unfair cigarette sales.

Violations of provisions, §4-75-713.

**DAMAGES —Cont'd****Comparative fault.**

Bank deposits and collections.

Unauthorized signature or alteration, customer's duty to report, §4-4-406.

Negotiable instruments.

Forged signature or alteration of instrument, §4-3-406.

**Consumer credit.**

Equal consumer credit act.

Violations, §4-87-105.

**Contributory fault.**

Bank deposits and collections.

Unauthorized signature or alteration, customer's duty to report, §4-4-406.

Negotiable instruments.

Forged signature or alteration of instrument, §4-3-406.

**Copyright collection practices, §4-76-107.****Credit reporting disclosures.**

Notice of adverse action.

Failure to provide, §4-93-104.

**Credit report security freezes.**

Action for noncompliance, §4-112-112.

**Credit services organizations.**

Violation of chapter, §4-91-105.

**Electronic mail.**

Unsolicited commercial and sexually explicit electronic mail, §4-88-606.

**Franchises.**

Franchisee's remedies, §4-72-208.

**Home solicitation sales.**

Violations of provisions, §4-89-105.

**Letters of credit.**

Wrongful dishonor or repudiation, §4-5-111.

**Limited partnerships.**

Dissociation.

General partners, wrongful dissociation, §4-47-604.

False information in records, damages caused in reliance on, §4-47-208.

**Milk and milk products.**

Unfair trade practices.

Violations of provisions, §4-75-809.

**Monopolies and restraint of trade.**

Actions by attorney general, §4-75-315.

Automobile dealer's anti-coercion act.

Double damages.

Actions by injured parties for double damages, §4-75-412.

Discrimination.

News furnishing.

Recovery by those discriminated against, §4-75-503.

**DAMAGES —Cont'd****Monopolies and restraint of trade —Cont'd**

Unfair practices.

Action by attorney general, §4-75-212.

Violations of provisions, §4-75-211.

**Odometer tampering.**

Treble damages, §4-90-207.

**Partnerships.**

Wrongful dissociation, liability, §4-46-602.

**Rental purchases.**

Liability of lessor, §4-92-103.

**Sale of goods, UCC.**

Antecedent breach.

Effect of cancellation or rescission on claims, §4-2-720.

Consequential damages.

Buyers, §4-2-715.

Contractual limitations, §4-2-719.

Cover by buyer, §4-2-712.

Deduction from price, §4-2-717.

Delivery of goods.

Buyer's damages for nondelivery, §4-2-713.

Incidental damages.

Buyers, §4-2-715.

Recovery by person in position of seller, §4-2-707.

Sellers, §4-2-710.

Limitation, §4-2-718.

Liquidation, §4-2-718.

Nonacceptance of goods.

Sellers, §4-2-708.

Repudiation by sellers.

Buyer's remedies, §4-2-713.

Repudiation of buyer.

Seller's damages, §4-2-708.

Resale of goods by seller, §§4-2-703, 4-2-706.

Warranty breaches, §4-2-714.

**Sales representatives.**

Noncompliance with provisions relating to payment of commission, §4-70-306.

**Spam.**

Unsolicited commercial and sexually explicit electronic mail, §4-88-606.

**Telephone and telegraph companies.**

Pay per call act.

Action for recovery to damages, §4-98-105.

**Trademarks.**

Violations of subchapter, §4-71-214.

**Trade secrets.**

Misappropriation, §4-75-606.

**DAMAGES —Cont'd**

**Unsolicited commercial and sexually explicit electronic mail,**  
§4-88-606.

**Warehouses.**

Limitation of warehouse's liability.  
Contractual limitation, §4-7-204.

**DEATH.****Franchises.**

Farm equipment retailer franchise protection.  
Death of retailer equivalent to termination, §4-72-306.

**Limited partnerships.**

Disposition of assets at dissolution, liability of estate, §4-47-812.  
Powers of estate of deceased partner, §4-47-704.

**DEBIT CARDS.****Numbers.**

Consumer protection against computer spyware act, §§4-111-101 to 4-111-105.  
Personally identifiable information defined, §4-111-102.  
Personal information protection act, §§4-110-101 to 4-110-108.

**Printing card numbers on receipts,**  
§4-107-303.

Credit card defined, §4-107-302.  
Legislative findings, §4-107-301.

**DEBT CANCELLATION**

**AGREEMENTS,** §§4-90-701 to 4-90-705.

**Deceptive trade practices, applicability of provisions,**  
§4-90-705.

**Definition,** §4-90-701.

**Disclosures,** §4-90-703.

**Legibility,** §4-90-703.

**Prohibitions,** §4-90-704.

**Requiring debtor to purchase,**  
§4-90-702.

**DEBT COUNSELING AND CREDIT SERVICES ORGANIZATIONS.**

**Citation of chapter,** §4-91-101.

**Contracts.**

Cancellation.  
Notice, §4-91-109.  
Requirements, §4-91-109.

**Damages.**

Violation of chapter, §4-91-105.

**Definitions,** §4-91-102.

**Information statements.**

Contents, §4-91-108.  
Requirements, §4-91-107.

**DEBT COUNSELING AND CREDIT SERVICES ORGANIZATIONS**

—Cont'd

**Penalties.**

Violation of chapter, §4-91-104.

**Prohibited acts,** §4-91-106.

**Title of chapter,** §4-91-101.

**Violation of chapter.**

Damages, §4-91-105.  
Penalties, §4-91-104.  
Prohibited acts, §4-91-106.

**Waiver of rights.**

Prohibited, §4-91-103.  
Void, §4-91-103.

**DEBTOR AND CREDITORS.**

**Debt cancellation agreements,**  
§§4-90-701 to 4-90-705.

**Letters of credit,** §§4-5-101 to 4-5-120.

**Limited partnerships.**

Assets, disposition at dissolution, §4-47-812.  
Claims against general partner, barring of, §4-47-808.  
Claims known at time of dissolution, §4-47-806.  
Claims not known at time of dissolution, §4-47-807.  
Transferable interests.  
Creditor's rights, §4-47-703.

**Nonprofit corporations (1993).**

Action by creditor against member, §4-33-614.

**Reports.**

Credit reporting disclosures, §§4-93-101 to 4-93-104.  
Credit report security freezes, §§4-112-101 to 4-112-114.

**Secured transactions,** §§4-9-101 to 4-9-709.

**DEBTS.**

**Cancellation agreements,** §§4-90-701 to 4-90-705.

**Contracts.**

Sale of goods.  
Creditors' rights and remedies.  
Sale on approval and sale or return transactions, §4-2-326.  
Sold goods.  
Rights of seller's creditors, §4-2-402.

**Cooperative associations.**

Members not liable for debts of associations, §4-30-117.

**Investment securities.**

Creditor's legal process, §4-8-112.

**DEBTS —Cont'd****Minors.**

Statute of frauds.

Promise to pay debt contracted during infancy.

Writing required, §4-59-101.

**Secured transactions.**

Generally, §§4-9-101 to 4-9-709.

**Statute of frauds.**

Promise to answer for debt of another.

Writing required, §4-59-101.

Promise to pay debt contracted during infancy.

Writing required, §4-59-101.

**DECEDENTS' ESTATES.****Franchises.**

Farm equipment.

Retailer's death, §4-72-306.

Franchisor restrictions, §4-72-206.

**Limited liability company member's interest.**

Power of estate of deceased member, §4-32-707.

**Limited partnerships.**

Disposition of assets at dissolution, liability of estate, §4-47-812.

Powers of estate of deceased partner, §4-47-704.

**Secured transactions.**

Filing statement, name of debtor, §4-9-503.

**DECLARATORY JUDGMENTS.****Monopolies and restraint of trade.**

Actions by attorney general, §4-75-315.

Unfair practices, §4-75-212.

**DEFAULTS.****Security agreements.**

Secured transactions, §§4-9-601 to 4-9-628.

**DEFENSES.****Assignments.**

Nonnegotiable instruments.

Retention of defenses, §§4-58-101, 4-58-105.

**Comparative fault.**

Bank deposits and collections.

Unauthorized signature or alteration, customer's duty to report, §4-4-406.

Negotiable instruments.

Forged signature or alteration of instrument, §4-3-306.

**Contracts.**

Unconscionability.

Sale of goods, §4-2-302.

**DEFENSES —Cont'd****Contributory fault.**

Bank deposits and collections.

Unauthorized signature or alteration, customer's duty to report, §4-4-406.

Negotiable instruments.

Forged signature or alteration of instrument, §4-3-406.

**Corporations.**

Ultra vires, §§4-26-205, 4-27-304.

**Electronic mail.**

Unsolicited commercial and sexually explicit electronic mail, §4-88-606.

**Fraudulent conveyances.**

Protection of transferee, §4-59-208.

**Investment securities, §4-8-114.**

Issuer's defenses.

Generally, §4-8-202.

**Leases.**

Commercial code.

Unconscionability, §4-2A-108.

**Lemon law.**

Affirmative defenses, §4-90-413.

**Negotiable instruments.**

Recoupment, §4-3-305.

**Spam.**

Unsolicited commercial and sexually explicit electronic mail, §4-88-606.

**Unsolicited commercial and sexually explicit electronic mail, §4-88-606.****DEFINED TERMS.****Abandoned.**

Trademarks, §4-71-201.

**Acceptance.**

Negotiable instruments, §4-3-409.

**Acceptor.**

Negotiable instruments, §4-3-103.

**Accession.**

Secured transactions, §4-9-102.

**Account.**

Bank deposits and collections, §4-4-104.

Secured transactions, §4-9-102.

**Account debtor.**

Secured transactions, §4-9-102.

**Accounting.**

Secured transactions, §4-9-102.

**Accrued preferential dividends.**

Business corporations, §4-26-102.

**Accurate.**

Weights and measures, §4-18-301.

**Acquirer.**

Financial transaction cards, §4-59-501.

**Action.**

Uniform commercial code, §4-1-201.

**DEFINED TERMS —Cont'd****Administrators.**

Service contracts, §4-114-103.

**Adverse claim.**

Investment securities, §4-8-102.

**Advertisement.**

Consumer protection against computer spyware act, §4-111-102.

Rental purchases, §4-92-102.

**Advisor.**

Letters of credit, §4-5-102.

**Affiliate.**

Fraudulent transfers, §4-59-201.

**Aftermarket crash part.**

Automobiles, §4-90-302.

**Afternoon.**

Bank deposits and collections, §4-4-104.

**Aggrieved party.**

Uniform commercial code, §4-1-201.

**Agreement.**

Sale of goods, §4-2-106.

Statute of frauds, §4-59-101.

Uniform commercial code, §4-1-201.

**Agreement for electronic presentment.**

Bank deposits and collections, §4-4-110.

**Agricultural lien.**

Secured transactions, §4-9-102.

**Alteration.**

Negotiable instruments, §4-3-407.

**Animal.**

Pet stores, §4-97-103.

**Anomalous indorsement.**

Negotiable instruments, §4-3-205.

**Applicant.**

Letters of credit, §4-5-102.

Trademarks, §4-71-201.

**Appointment of agent.**

Registered agents, §4-20-102.

**Appropriate evidence of appointment or incumbency.**

Investment securities, §4-8-402.

**Appropriate person.**

Investment securities, §4-8-107.

**Appropriate trade premises.**

Home solicitation sales, §4-89-102.

**Approved by (or approval by) the members.**

Nonprofit corporations, §4-33-140.

**Art.**

Artists' consignment, §4-73-202.

**Art dealer.**

Artists' consignment, §4-73-202.

**Articles.**

Water authorities, §4-35-103.

**DEFINED TERMS —Cont'd****Articles of incorporation.**

Business corporations, §§4-26-102, 4-27-140.

Nonprofit corporations, §4-33-140.

**Articles of organization.**

Limited liability companies, §4-32-102.

**Artist.**

Artists' consignment, §4-73-202.

Fine prints sales, §4-73-301.

**As-extracted collateral.**

Secured transactions, §4-9-102.

**Asset.**

Fraudulent transfers, §4-59-201.

**Assistive device, §4-105-201.****Assistive device dealer, §4-105-201.****Assistive device lessor, §4-105-201.****Assistive device warranty, §4-105-201.****ASTM.**

Quality specifications for engine fuels, petroleum products and automotive lubricants, §4-108-203.

**Auction company.**

Odometer regulations, §4-90-202.

**Authenticate.**

Secured transactions, §4-9-102.

**Authorized account.**

Funds transfers, §4-4A-105.

**Authorized distributors of record.**

Drug samples, distribution of, §4-117-101.

**Authorized person.**

Pet stores, §4-97-103.

**Authorized shares.**

Business corporations, §§4-26-102, 4-27-140.

**Authorized user.**

Consumer protection against computer spyware act, §4-111-102.

**Automotive lubricants.**

Quality specifications for engine fuels, petroleum products and automotive lubricants, §4-108-203.

**Bailee.**

Documents of title, §4-7-102.

**Bank.**

Bank deposits and collections, §4-4-105.

Funds transfers, §4-4A-105.

Secured transactions, §4-9-102.

Uniform commercial code, §4-1-201.

**Banker's credit.**

Sale of goods, §4-2-325.

**Banking day.**

Bank deposits and collections, §4-4-104.

**DEFINED TERMS —Cont'd****Basic cost of cigarettes.**

Unfair cigarette sales, §4-75-702.

**Bearer.**

Uniform commercial code, §4-1-201.

**Bearer form.**

Investment securities, §4-8-102.

**Beneficial owner.**

Dental corporations, §4-29-402.

Medical corporations, §4-29-302.

Professional corporations, §4-29-202.

**Beneficial shareholder.**

Business corporations.

Dissenters' rights, §4-27-1301.

**Beneficiary.**

Funds transfers, §4-4A-103.

Letters of credit, §4-5-102.

**Beneficiary's bank.**

Funds transfers, §4-4A-103.

**Between merchants.**

Sale of goods, §4-2-104.

**Bids.**

Motion pictures.

Unfair practices, §4-75-902.

**Bill of lading.**

Uniform commercial code, §4-1-201.

**Blank indorsement.**

Negotiable instruments, §4-3-205.

**Blind bidding.**

Motion pictures.

Unfair practices, §4-75-902.

**Board.**

Drug samples, distribution of,  
§4-117-101.

**Board of directors.**

Nonprofit corporations, §4-33-140.

Nonprofit organizations, §4-28-202.

**Bonds.**

Water authorities, §4-35-103.

**Branch.**

Uniform commercial code, §4-1-201.

**Breach of the security of the system.**

Personal information protection act,  
§4-110-103.

**Broadband,** §4-113-102.**Broadband backbone,** §4-113-102.**Broker.**

Investment securities, §4-8-102.

**Building materials.**

Price gouging, §4-88-302.

**Bulk meter.**

Weights and measures, §4-18-344.

**Bundled software.**

Consumer protection against computer  
spyware act, §4-111-102.

**Burden of establishing.**

Uniform commercial code, §4-1-201.

**DEFINED TERMS —Cont'd****Business.**

Partnerships, §4-46-101.

Personal information protection act,  
§4-110-103.

**Business trust.**

Foreign business trusts, filing  
requirements, §4-31-401.

**Buy.**

Automobile dealers' anti-coercion,  
§4-75-402.

**Buyer.**

Credit service organizations,  
§4-91-102.

Health spa consumer protection,  
§4-94-102.

Sale of goods, §4-2-103.

**Buyer in ordinary course of  
business.**

Leases, UCC, §4-2A-103.

Uniform commercial code, §4-1-201.

**Buying pool.**

Unfair cigarette sales, §4-75-702.

**Bylaws.**

Nonprofit corporations, §4-33-140.

**Calendar day.**

Motor vehicle warranties, §4-90-403.

**Caller identification service.**

Caller identification blocking by  
telephonic sellers, §4-99-301.

Deceptive trade practices, §4-88-102.

Telephone sellers, §4-99-103.

**Cancellation.**

Leases, UCC, §4-2A-103.

Sale of goods, §4-2-106.

**C. & F.**

Sale of goods, §4-2-320.

**Capital surplus.**

Business corporations, §4-26-616.

**Cardholder.**

Financial transaction cards.

Fraud, §4-59-501.

Transfer of credit card debt,  
§4-107-201.

**Card issuer.**

Transfer of credit card debt,  
§4-107-201.

**Carrier.**

Documents of title, §4-7-102.

**Cashier's check.**

Negotiable instruments, §4-3-104.

**Cash proceeds.**

Secured transactions, §4-9-102.

**Cattery.**

Pet stores, §4-97-103.

**Cause to be copied.**

Consumer protection against computer  
spyware act, §4-111-102.

**DEFINED TERMS —Cont'd****Certificated security.**

Investment securities, §4-8-102.

**Certificate of limited partnership,**  
§4-47-102.**Certificate of title.**

Secured transactions, §4-9-102.

**Certificates of deposit.**

Negotiable instruments, §4-3-104.

**Certified check.**

Negotiable instruments, §4-3-409.

**Charitable organization.**Caller identification blocking by  
telephonic sellers, §4-99-301.

Containers, §4-103-201.

Deceptive trade practices, §4-88-102.

Solicitation of charitable contributions,  
§4-28-401.**Charitable purpose.**

Containers, §4-103-201.

Solicitation of charitable contributions,  
§4-28-401.**Charitable sales promotion.**Solicitation of charitable contributions,  
§4-28-401.**Chattel paper.**

Secured transactions, §4-9-102.

**Check, §4-60-101.**Negotiable instruments, §§4-3-104,  
4-3-312.**C.I.F.**

Sale of goods, §4-2-320.

**Cigarette.**

Unfair sales, §4-75-702.

**Claim.**

Fraudulent transfers, §4-59-201.

**Claimant.**

Negotiable instruments, §4-3-312.

**Class.**

Nonprofit corporations, §4-33-140.

**Clearing corporation.**

Investment securities, §4-8-102.

**Clearinghouse.**Bank deposits and collections,  
§4-4-104.**Collateral.**

Secured transactions, §4-9-102.

**Collateral charges.**

Motor vehicle warranties, §4-90-403.

**Collateral costs.**

Assistive device warranty, §4-105-201.

**Collecting bank.**Bank deposits and collections,  
§4-4-105.**Commercial.**Unsolicited commercial and sexually  
explicit electronic mail prevention  
act, §4-88-602.**DEFINED TERMS —Cont'd****Commercial coventurer.**Solicitation of charitable contributions,  
§4-28-401.**Commercial registered agent,**  
§4-20-102.**Commercial tort claim.**

Secured transactions, §4-9-102.

**Commercial unit.**

Leases, UCC, §4-2A-103.

Sale of goods, §4-2-105.

**Commercial weighing and  
measuring equipment, §4-18-301.****Commingled goods.**

Secured transactions, §4-9-336.

**Commission.**

Sales representatives, §4-70-301.

**Commodities.**

Weights and measures, §4-18-301.

**Commodity account.**

Secured transactions, §4-9-102.

**Commodity contract.**

Secured transactions, §4-9-102.

**Commodity customer.**

Secured transactions, §4-9-102.

**Commodity intermediary.**

Secured transactions, §4-9-102.

**Communicate.**

Investment securities, §4-8-102.

Secured transactions, §4-9-102.

**Compensation.**

Deceptive trade practices, §4-88-109.

**Computer network.**Unsolicited commercial and sexually  
explicit electronic mail prevention  
act, §4-88-602.**Computer software.**Consumer protection against computer  
spyware act, §4-111-102.**Computer virus.**Consumer protection against computer  
spyware act, §4-111-102.**Condition.**

Motor vehicle warranties, §4-90-403.

**Confirmed credit.**

Sale of goods, §4-2-325.

**Confirmer.**

Letters of credit, §4-5-102.

**Conforming.**

Leases, UCC, §4-2A-103.

**Conforming to contract.**

Sale of goods, §4-2-106.

**Consideration.**

Negotiable instruments, §4-3-303.

**Consignee.**

Documents of title, §4-7-102.

Secured transactions, §4-9-102.

**DEFINED TERMS —Cont'd****Consignment.**

Secured transactions, §4-9-102.

**Consignor.**

Documents of title, §4-7-102.

Secured transactions, §4-9-102.

**Conspicuous.**

Business corporations, §4-27-140.

Uniform commercial code, §4-1-201.

**Constituent corporation.**

Corporate mergers, §§4-26-1001,  
4-27-1101.

**Constituent limited liability company, §4-32-1201.****Constituent limited partnership, §4-47-1101.****Constituent organization.**

Corporate mergers, §§4-26-1001,  
4-27-1101.

Limited liability companies,  
§4-32-1201.

Limited partnerships, conversion and  
merger, §4-47-1101.

Partnerships, conversions and  
mergers, §4-46-901.

Unincorporated nonprofit associations,  
mergers, §4-28-630.

**Constituent partnership.**

Partnerships, conversions and  
mergers, §4-46-901.

**Consumer.**

Assistive device warranty, §4-105-201.

Caller identification blocking by  
telephonic sellers, §4-99-301.

Credit report security freezes,  
§4-112-102.

Motor vehicle warranties, §4-90-403.

Pet stores, §4-97-103.

Refund anticipation loans, §4-116-102.

Rental purchases, §4-92-102.

Service contracts, §4-114-103.

Uniform commercial code, §4-1-201.

**Consumer debtor.**

Secured transactions, §4-9-102.

**Consumer food item.**

Price gouging, §4-88-302.

**Consumer goods.**

Secured transactions, §4-9-102.

**Consumer goods transaction.**

Secured transactions, §4-9-102.

**Consumer lease.**

Leases, UCC, §4-2A-103.

**Consumer obligor.**

Secured transactions, §4-9-102.

**Consumer product.**

Mail and telephone solicitation sales,  
§4-95-102.

**DEFINED TERMS —Cont'd****Consumer report.**

Credit report security freezes,  
§4-112-102.

**Consumer reporting agency.**

Credit report security freezes,  
§4-112-102.

**Consumer transaction.**

Negotiable instruments, §4-3-103.

Secured transactions, §4-9-102.

**Container.**

Charitable solicitation, §4-103-201.

**Continuation statement.**

Secured transactions, §4-9-102.

**Contract.**

Sale of goods, §4-2-106.

Uniform commercial code, §4-1-201.

**Contract for health spa services.**

Health spa consumer protection,  
§4-94-102.

**Contract for sale.**

Sale of goods, §4-2-106.

**Contribution.**

Deceptive trade practices, §4-88-102.

Limited partnerships, §4-47-102.

Solicitation of charitable contributions,  
§4-28-401.

**Converted organization.**

Corporate mergers, §§4-26-1001,  
4-27-1101.

Limited liability companies,  
§4-32-1201.

Limited partnerships, §4-47-1101.

Partnerships, conversions and  
mergers, §4-46-901.

**Converting corporation.**

Corporate mergers, §§4-26-1001,  
4-27-1101.

**Converting limited liability company, §4-32-1201.****Converting limited partnership, §4-47-1101.****Converting organization.**

Corporate mergers, §§4-26-1001,  
4-27-1101.

Limited liability companies,  
§4-32-1201.

Limited partnerships, §4-47-1101.

Partnerships, conversions and  
mergers, §4-46-901.

**Converting partnership.**

Partnerships, conversions and  
mergers, §4-46-901.

**Cooperative bank.**

Cooperative associations, §4-30-201.

**Cooperative plan.**

Cooperative associations, §4-30-101.

**DEFINED TERMS —Cont'd****Copyright owner.**

Collection practices, §4-76-102.

**Cord.**

Weights and measures, §4-18-333.

**Corporation.**

Business corporations, §§4-26-102,  
4-27-140.

Dissenters' rights, §4-27-1301.

Limited liability companies, §4-32-102.

Nonprofit corporations, §4-33-140.

Indemnification, §4-33-850.

Nonprofit organizations, §4-28-202.

**Correct.**

Weights and measures, §4-18-301.

**Cost of doing business.**

Unfair practices, §4-75-209.

**Costs.**

Milk and dairy products.

Unfair practices, §4-75-802.

Unfair practices, §4-75-209.

**Cost to the retailer.**

Unfair cigarette sales, §4-75-702.

**Cost to wholesaler.**

Unfair cigarette sales, §4-75-702.

**County.**

Business corporations.

Filing of corporate documents,  
§4-26-1201.

**Course of dealing.**

Uniform commercial code, §4-1-303.

**Course of performance.**

Uniform commercial code, §4-1-303.

**Court.**

Limited liability companies, §4-32-102.

**Cover.**

Uniform commercial code, §4-2-712.

**Credit.**

Statute of frauds, §4-59-101.

Transfer of credit card debt,  
§4-107-201.

**Credit card.**

Printing account number on receipts,  
§4-107-302.

Solicitation on college campus,  
§4-104-201.

Transfer of credit card debt,  
§4-107-201.

**Credit card issuer.**

Solicitation of credit card on college  
campus, §4-104-201.

**Creditor.**

Fraudulent transfers, §4-59-201.

Refund anticipation loans, §4-116-102.

Transfer of credit card debt,  
§4-107-201.

Uniform commercial code, §4-1-201.

**DEFINED TERMS —Cont'd****Creditor process.**

Funds transfers, §4-4A-502.

**Credit report.**

Credit report security freezes,  
§4-112-102.

**Credit services organization,**

§4-91-102.

**Current model.**

Farm equipment retailer franchise  
protection, §4-72-301.

**Current net price.**

Farm equipment retailer franchise  
protection, §4-72-301.

**Customer.**

Bank deposits and collections,  
§4-4-104.

Funds transfers, §4-4A-105.

Personal information protection act,  
§4-110-103.

**Damages.**

Consumer protection against computer  
spyware act, §4-111-102.

**Dealer.**

Odometer regulations, §4-90-202.

**Dealership agreement.**

Farm equipment retailer franchise  
protection, §4-72-301.

**Debit card.**

Fair gift card act, §4-88-702.

**Debt.**

Fraudulent transfers, §4-59-201.

**Debt cancellation agreement,**

§4-90-701.

**Debtor.**

Fraudulent transfers, §4-59-201.

Secured transactions, §4-9-102.

**Debtor in bankruptcy.**

Limited partnerships, §4-47-102.

Partnerships, §4-46-101.

**Debtor's correct name.**

Secured transactions, §4-9-506.

**Deceptive trade practices.**

Home solicitation sales, §4-89-102.

**Declaration of loss.**

Negotiable instruments, §4-3-312.

**Defendant.**

Uniform commercial code, §4-1-201.

**Delegates.**

Nonprofit corporations, §4-33-140.

**Deliver.**

Business corporations, §4-27-140.

Nonprofit corporations, §4-33-140.

**Delivery.**

Uniform commercial code, §4-1-201.

**Delivery order.**

Documents of title, §4-7-102.

**DEFINED TERMS —Cont'd****Demonstrator.**

Assistive device warranties,  
§4-105-201.

**Deposit account.**

Secured transactions, §4-9-102.

**Depository bank.**

Bank deposits and collections,  
§4-4-105.

**Designated director.**

Nonprofit corporations, §4-33-140.

**Designated office.**

Limited partnerships, §4-47-102.

**Dilution.**

Trademarks, §4-71-201.

**Disabled person.**

Deceptive trade practices.  
Enhanced penalties, §4-88-201.

**Disclosure label.**

Charitable solicitation, §4-103-201.

**Dishonor.**

Letters of credit, §4-5-102.

**Dissenter.**

Business corporations, §4-27-1301.

**Distribute.**

Drug samples, distribution of,  
§4-117-101.

**Distributed denial of service (DDoS).**

Consumer protection against computer  
spyware act, §4-111-102.

**Distribution.**

Business corporations, §4-27-140.  
Limited partnerships, §4-47-102.  
Nonprofit corporations, §4-33-140.  
Partnerships, §4-46-101.

**Distributor.**

Motion pictures.  
Unfair practices, §4-75-902.  
Odometer regulations, §4-90-202.

**Document.**

Letters of credit, §4-5-103.  
Secured transactions, §4-9-102.

**Documentary draft.**

Bank deposits and collections,  
§4-4-104.

**Document of title.**

Uniform commercial code, §4-1-201.

**Domestic corporation.**

Business corporations, §§4-26-102,  
4-27-140.  
Nonprofit corporations, §4-33-140.

**Domestic entity.**

Registered agents, §4-20-102.

**Domestic limited liability company,**

§4-32-102.

**Dormancy fee.**

Fair gift card act, §4-88-702.

**DEFINED TERMS —Cont'd****Draft.**

Bank deposits and collections,  
§4-4-104.

**Drawee.**

Bank deposits and collections,  
§4-4-104.  
Checks, §4-60-101.  
Negotiable instruments, §4-3-103.

**Drawer.**

Checks, §4-60-101.  
Negotiable instruments, §4-3-103.

**Drug.**

Drug samples, distribution of,  
§4-117-101.

**Drug sample.**

Prescription drugs, §4-117-101.

**D.V.M.**

Pet stores, §4-97-103.

**Early termination cost.**

Assistive device warranty, §4-105-201.

**Early termination saving.**

Assistive device warranty, §4-105-201.

**Earned surplus.**

Business corporations, §4-26-616.

**Elderly person.**

Deceptive trade practices.  
Enhanced penalties, §4-88-201.

**Electronic chattel paper.**

Secured transactions, §4-9-102.

**Electronic mail.**

Unsolicited commercial and sexually  
explicit electronic mail prevention  
act, §4-88-602.

**Electronic mail address.**

Unsolicited commercial and sexually  
explicit electronic mail prevention  
act, §4-88-602.

**Emergency supplies.**

Price gouging, §4-88-302.

**Employee.**

Business corporations, §4-27-140.  
Fraudulent indorsement, §4-3-405.  
Nonprofit corporations, §4-33-140.

**Encumbrance.**

Secured transactions, §4-9-102.

**Engine fuel.**

Quality specifications for engine fuels,  
petroleum products and  
automotive lubricants, §4-108-203.

**Engine fuel designed for special use.**

Quality specifications for engine fuels,  
petroleum products and  
automotive lubricants, §4-108-203.

**Entitlement holder.**

Investment securities, §4-8-102.

**Entitlement order.**

Investment securities, §4-8-102.

**DEFINED TERMS —Cont'd****Entity.**

- Business corporations, §4-27-140.
- Nonprofit corporations, §4-33-140.
- Registered agents, §4-20-102.

**Equipment.**

- Secured transactions, §4-9-102.

**Established practices.**

- Unincorporated nonprofit associations, §4-28-602.

**Euthanasia.**

- Pet stores, §4-97-103.

**Event of dissociation.**

- Limited liability companies, §4-32-102.

**Execute.**

- Consumer protection against computer spyware act, §4-111-102.

**Executed.**

- Funds transfers, §4-4A-301.

**Execution date.**

- Funds transfers, §4-4A-301.

**Exhibitor.**

- Motion pictures.
- Unfair practices, §4-75-902.

**Exhibit or exhibition.**

- Motion pictures.
- Unfair practices, §4-75-902.

**Expenses.**

- Nonprofit corporations.
- Indemnification, §4-33-850.

**Explanation.**

- Secured transactions, §4-9-616.

**Ex-ship.**

- Sale of goods, §4-2-322.

**Extension of credit.**

- Credit services organizations, §4-91-102.

**Facilitator.**

- Refund anticipation loans, §4-116-102.

**Fair value.**

- Business corporations.
- Dissenters' rights, §4-27-1301.

**Farming operation.**

- Secured transactions, §4-9-102.

**Farm products.**

- Secured transactions, §4-9-102.

**F.A.S.**

- Sale of goods, §4-2-319.

**Fault.**

- Leases, UCC, §4-2A-103.
- Uniform commercial code, §4-1-201.

**Fiduciary.**

- Negotiable instruments, §4-3-307.

**File.**

- Nonprofit corporations, §4-33-140.

**File number.**

- Secured transactions, §4-9-102.

**DEFINED TERMS —Cont'd****Filing entity.**

- Registered agents, §4-20-102.

**Filing office.**

- Secured transactions, §4-9-102.

**Filing office rule.**

- Secured transactions, §4-9-102.

**Finance lease.**

- Leases, UCC, §4-2A-103.

**Financial asset.**

- Investment securities, §4-8-102.

**Financial institution.**

- Fair gift card act, §4-88-702.

**Financial transaction card.**

- Fraud, §4-59-501.

**Financing agency.**

- Sale of goods, §4-2-104.

**Financing statement.**

- Secured transactions, §4-9-102.

**Fine print.**

- Sales of fine prints, §4-73-301.

**First run.**

- Motion pictures, §4-75-902.

**Fixture filing.**

- Secured transactions, §4-9-102.

**Fixtures.**

- Secured transactions, §4-9-102.

**F.O.B.**

- Sale of goods, §4-2-319.

**Foreign bank or trust company with fiduciary powers.**

- Foreign investors, §4-31-302.

**Foreign corporation.**

- Business corporations, §§4-26-102, 4-27-140.
- Nonprofit corporations, §4-33-140.
- Nonprofit organizations, §4-28-202.

**Foreign entity.**

- Registered agents, §4-20-102.

**Foreign limited liability company, §4-32-102.****Foreign limited liability partnership.**

- Limited partnerships, §4-47-102.
- Partnerships, §4-46-101.

**Foreign limited partnership, §4-47-102.****Foreign qualification document.**

- Registered agents, §4-20-102.

**Franchise, §4-72-202.**

- Petroleum products suppliers, dealers and distributors, §4-72-501.
- Petroleum suppliers and distributors, §4-72-401.

**Franchisee.**

- Franchises, §4-72-202.
- Restaurant franchises, §4-72-601.

**DEFINED TERMS —Cont'd****Franchisor.**

Franchises, §4-72-202.

Restaurant franchises, §4-72-601.

**Fraudulent indorsement.**

Negotiable instruments, §4-3-405.

**Fund raising council.**

Solicitation of charitable contributions,  
§4-28-401.

**Funds transfer, §4-4A-104.****Funds-transfer business day.**

Funds transfers, §4-4A-105.

**Funds-transfer system, §4-4A-105.****Funds-transfer system rule,  
§4-4A-501.****Fungible goods.**

Uniform commercial code, §4-1-201.

**Future goods.**

Sale of goods, §4-2-105.

**GAP waiver agreement.**

Debt cancellation agreements,  
§4-90-701.

**Gasoline.**

Price gouging, §4-88-302.

**General intangible.**

Secured transactions, §4-9-102.

**General partner.**

Limited partnerships, §4-47-102.

Conversion and merger, §4-47-1101.

**General use prepaid card.**

Fair gift card act, §4-88-702.

**Genuine.**

Uniform commercial code, §4-1-201.

**Gift certificate.**

Fair gift card act, §4-88-702.

**Gift or prize.**

Mail and telephone solicitation sales,  
§4-95-102.

**Gives notice.**

Uniform commercial code, §4-1-201.

**Going out of business sale, §4-74-101.****Good cause.**

Franchises, §4-72-202.

**Good faith.**

Franchises, §4-72-202.

Letters of credit, §4-5-102.

Negotiable instruments, §4-3-103.

Uniform commercial code, §4-1-201.

**Goods.**

Deceptive trade practices, §4-88-102.

Documents of title, §4-7-102.

Home solicitation sales, §4-89-102.

Leases, UCC, §4-2A-103.

Price gouging, §4-88-302.

Sale of goods, §4-2-105.

Secured transactions, §4-9-102.

**Governance interest.**

Registered agents, §4-20-102.

**DEFINED TERMS —Cont'd****Governing principles.**

Unincorporated nonprofit associations,  
§4-28-602.

**Governing statute.**

Corporate mergers, §§4-26-1001,  
4-27-1101.

Limited liability companies,  
§4-32-1201.

Limited partnerships, conversion and  
merger, §4-47-1101.

Partnerships, conversions and  
mergers, §4-46-901.

**Governmental subdivision.**

Business corporations, §4-27-140.

Nonprofit corporations, §4-33-140.

**Governmental unit.**

Secured transactions, §4-9-102.

**Governor.**

Registered agents, §4-20-102.

**Gross invoice cost.**

Unfair cigarette sales act, §4-75-702.

**Gross revenue.**

Solicitation of charitable contributions,  
§4-28-401.

**Guaranteed automobile protection  
waiver agreement.**

Debt cancellation agreements,  
§4-90-701.

**Guarantee of the signature.**

Investment securities, §4-8-402.

**Hardware.**

Consumer protection against computer  
spyware act, §4-111-102.

**Harmful to minors.**

Unsolicited commercial and sexually  
explicit electronic mail prevention  
act, §4-88-602.

**Health care insurance receivable.**

Secured transactions, §4-9-102.

**Health spa.**

Consumer protection, §4-94-102.

**Holder.**

Motor vehicle service contracts,  
§4-90-502.

Uniform commercial code, §4-1-201.

**Holder in due course.**

Negotiable instruments, §4-3-302.

**Home solicitation sale, §4-89-102.****Honor.**

Letters of credit, §4-5-102.

**Household goods.**

Documents of title, §4-7-209.

**Housing.**

Price gouging, §4-88-302.

**Impression.**

Fine prints sales, §4-73-301.

**DEFINED TERMS —Cont'd****Improper means.**

Theft of trade secrets, §4-75-601.

**Inactivity charge or fee.**

Fair gift card act, §4-88-702.

**In a record.**

Corporate mergers, §§4-26-1001, 4-27-1101.

Limited liability companies, §4-32-1201.

Partnerships, conversions and mergers, §4-46-901.

**Incidental charges.**

Motor vehicle warranties, §4-90-403.

**Includes.**

Business corporations, §4-27-140.

Nonprofit corporations, §4-33-140.

**Incomplete instrument.**

Negotiable instruments, §4-3-115.

**Indenture.**

Water authorities, §4-35-103.

**Individual.**

Business corporations, §4-27-140.

Nonprofit corporations, §4-33-140.

Personal information protection act, §4-110-103.

**Indorsement.**

Investment securities, §4-8-102.

Negotiable instruments, §4-3-204.

**Indorser.**

Negotiable instruments, §4-3-204.

Discharge of indorsers and accommodation parties, §4-3-605.

**Information provider.**

Pay per call consumer protection, §4-98-102.

**Insider.**

Fraudulent transfers, §4-59-201.

**Insolvency proceedings.**

Uniform commercial code, §4-1-201.

**Insolvent.**

Business corporations, §4-26-102.

Uniform commercial code, §4-1-201.

**Installer.**

Aftermarket crash parts, §4-90-302.

**Installment lease contract.**

Leases, UCC, §4-2A-103.

**Institution of higher education.**

Credit card solicitation on college campus, §4-104-201.

**Instruction.**

Investment securities, §4-8-102.

**Instrument.**

Negotiable instruments, §4-3-104.

Secured transactions, §4-9-102.

**Insurer.**

Aftermarket crash parts, §4-90-302.

**DEFINED TERMS —Cont'd****Intentionally deceptive.**

Consumer protection against computer spyware act, §4-111-102.

**Interactive computer service.**

Unsolicited commercial and sexually explicit electronic mail prevention act, §4-88-602.

**Interest.**

Business corporations.

Dissenters' rights, §4-27-1301.

Registered agents, §4-20-102.

**Interest holder.**

Registered agents, §4-20-102.

**Interest in the limited liability company.**

Limited liability companies, §4-32-102.

**Intermediary bank.**

Bank deposits and collections, §4-4-105.

Funds transfers, §4-4A-104.

**Internet.**

Consumer protection against computer spyware act, §4-111-102.

**Internet address.**

Consumer protection against computer spyware act, §4-111-102.

**Internet domain name.**

Unsolicited commercial and sexually explicit electronic mail prevention act, §4-88-602.

**Inventory.**

Farm equipment retailer franchise protection, §4-72-301.

Secured transactions, §4-9-102.

**Investigator.**

Weights and measures, §4-18-301.

**Investment company.**

Business corporations, §4-27-140.

**Investment company security.**

Rules for classifying assets, §4-8-103.

**Investment property.**

Secured transactions, §4-9-102.

**Invitation for bids.**

Motion pictures, §4-75-902.

**Issue.**

Checks, §4-60-101.

Negotiable instruments, §4-3-105.

**Issuer.**

Documents of title, §4-7-102.

Financial transaction cards.

Fraud, §4-59-501.

Investment securities, §4-8-201.

Letters of credit, §4-5-103.

Negotiable instruments, §4-3-105.

**Issuer's jurisdiction.**

Investment security, §4-8-110.

**DEFINED TERMS —Cont'd****Item.**

Bank deposits and collections,  
§4-4-104.

Telephonic sellers, §4-99-103.

**Jurisdiction of organization.**

Registered agents, §4-20-102.

Secured transactions, §4-9-102.

**Juristic person.**

Trademarks, §4-71-201.

**Kennel.**

Pet stores, §4-97-103.

**Last mile broadband.**

Connect Arkansas broadband program,  
§4-113-102.

**Lease.**

Leases, UCC, §4-2A-103.

Motor vehicle transfers, §4-100-101.

**Lease agreement.**

Leases, UCC, §4-2A-103.

**Lease contract.**

Leases, UCC, §4-2A-103.

**Leased motor vehicle.**

Odometer regulations, §4-90-202.

**Leasehold interest.**

Leases, UCC, §4-2A-103.

**Lease price.**

Motor vehicle warranties, §4-90-403.

**Lessee.**

Leases, UCC, §4-2A-103.

Motor vehicle warranties, §4-90-403.

**Lessee cost.**

Motor vehicle warranties, §4-90-403.

**Lessee in ordinary course of business.**

Leases, UCC, §4-2A-103.

**Lessor.**

Leases, UCC, §4-2A-103.

Motor vehicle warranties, §4-90-403.

Rental purchases, §4-92-102.

**Lessor's residual interest.**

Leases, UCC, §4-2A-103.

**Letter of credit, §4-5-103.**

Sale of goods, §4-2-325.

**Letter of credit right.**

Secured transactions, §4-9-102.

**Liability.**

Nonprofit corporations.

Indemnification, §4-33-850.

**License agreement.**

Motion pictures.

Unfair practices, §4-75-902.

**Licensed pharmacist.**

Drug samples, distribution of,  
§4-117-101.

**Licensee in ordinary course of business.**

Secured transactions, §4-9-321.

**DEFINED TERMS —Cont'd****Lien.**

Fraudulent transfers, §4-59-201.

Leases, UCC, §4-2A-103.

**Lien creditor.**

Secured transactions, §4-9-102.

**Limited liability company, §4-32-102.****Limited liability company interest,  
§4-32-102.****Limited liability limited  
partnership, §4-47-102.****Limited liability partnership,  
§4-46-101.****Limited partner, §4-47-102.****Limited partnership, §4-47-102.**

Limited liability companies, §4-32-102.

**Local emergency.**

Price gouging, §4-88-302.

**Lot.**

Leases, UCC, §4-2A-103.

Sale of goods, §4-2-105.

**Maintenance agreement.**

Service contracts, §4-114-103.

**Major life activities.**

Deceptive trade practices.

Enhanced penalties, §4-88-201.

**Maker.**

Negotiable instruments, §4-3-103.

**Manager.**

Limited liability companies, §4-32-102.

Unincorporated nonprofit associations,  
§4-28-602.

**Manufactured home.**

Secured transactions, §4-9-102.

**Manufactured home transaction.**

Secured transactions, §4-9-102.

**Manufacturer.**

Assistive device warranty, §4-105-201.

Farm equipment retailer franchise  
protection, §4-72-301.

Motor vehicle warranties, §4-90-403.

Service contracts, §4-114-103.

**Manufacturer promotional  
allowance.**

Unfair cigarette sales act, §4-75-702.

**Mark.**

Trademarks and labels, §4-71-201.

**Means.**

Business corporations, §4-27-140.

Nonprofit corporations, §4-33-140.

**Mechanical breakdown insurance.**

Motor vehicle service contracts,  
§4-90-502.

Service contracts, §4-114-103.

**Medical information.**

Personal information protection act,  
§4-110-103.

**DEFINED TERMS —Cont'd****Medical supplies.**

Price gouging, §4-88-302.

**Member.**

Limited liability companies, §4-32-102.

Nonprofit corporations, §4-33-140.

Unincorporated nonprofit associations,  
§4-28-602.

**Membership.**

Nonprofit corporations, §4-33-140.

Solicitation of charitable contributions,  
§4-28-401.

**Merchandise.**

Rental purchases, §4-92-102.

**Merchant.**

Sale of goods, §4-2-104.

**Merchant lessee.**

Leases, UCC, §4-2A-103.

**Midnight deadline.**

Bank deposits and collections,  
§4-4-104.

**Misappropriation.**

Theft of trade secrets, §4-75-601.

**Monopoly, §4-75-301.****Mortgage.**

Secured transactions, §4-9-102.

**Motor vehicle.**

Odometer regulations, §4-90-202.

Service contracts, §4-90-502.

Transfers, §4-100-101.

Warranties, §4-90-403.

**Motor vehicle quality assurance period, §4-90-403.****Motor vehicle service contract, §4-90-502.****Motor vehicle service contract provider, §4-90-502.****Motor vehicle service contract reimbursement insurance policy, §4-90-502.****Motor vehicle transfers, §4-100-101.****Mutual benefit corporation.**

Nonprofit corporations, §4-33-140.

**Negotiable instrument, §4-3-104.****Negotiation.**

Negotiable instruments, §4-3-201.

**Net assets.**

Business corporations, §4-26-102.

**Net cost.**

Farm equipment retailer franchise protection, §4-72-301.

**Net mass.**

Weights and measures, §4-18-301.

**Net weight.**

Weights and measures, §4-18-301.

**New debtor.**

Secured transactions, §4-9-102.

**DEFINED TERMS —Cont'd****New value.**

Secured transactions, §4-9-102.

**Nominated person.**

Letters of credit, §4-5-102.

**Noncash proceeds.**

Secured transactions, §4-9-102.

**Noncommercial registered agent, §4-20-102.****Nonconformity.**

Assistive device warranty, §4-105-201.

Motor vehicle warranties, §4-90-403.

**Nonoriginal equipment**

**manufacturer aftermarket crash part, §4-90-302.**

**Nonoriginal manufacturer's parts.**

Service contracts, §4-114-103.

**Nonprofit organization, §4-28-104.****Nonqualified foreign entity.**

Registered agents, §4-20-102.

**Nonresident LLP statement.**

Registered agents, §4-20-102.

**Nonsurviving organization.**

Unincorporated nonprofit associations,  
mergers, §4-28-630.

**Notary public.**

Notario or notario publico.

Advertising services using terms,  
§4-109-101.

**Not-for-profit corporation.**

Nonprofit organizations, §4-28-202.

**Notifies.**

Uniform commercial code, §4-1-201.

**Obligated bank.**

Negotiable instruments, §§4-3-312,  
4-3-411.

**Obligor.**

Secured transactions, §4-9-102.

**Odometer, §4-90-202.****Official capacity.**

Nonprofit corporations.

Indemnification, §4-33-850.

**On consignment.**

Artists' consignment, §4-73-202.

**Open-end credit plan.**

Transfer of credit card debt,  
§4-107-201.

**Operating agreement.**

Limited liability companies, §4-32-102.

**Order.**

Negotiable instruments, §4-3-103.

**Ordinary care.**

Negotiable instruments, §4-3-103.

**Organic law.**

Registered agents, §4-20-102.

**Organic rules.**

Registered agents, §4-20-102.

**DEFINED TERMS —Cont'd****Organization.**

- Corporate mergers, §§4-26-1001, 4-27-1101.
- Limited liability companies, §4-32-1201.
- Limited partnerships, conversion and merger, §4-47-1101.
- Partnerships, conversions and mergers, §4-46-901.
- Uniform commercial code, §4-1-201.
- Unincorporated nonprofit associations, mergers, §4-28-630.

**Organizational documents.**

- Corporate mergers, §§4-26-1001, 4-27-1101.
- Limited liability companies, §4-32-1201.
- Limited partnerships, conversion and merger, §4-47-1101.
- Partnerships, conversions and mergers, §4-46-901.

**Original debtor.**

- Secured transactions, §4-9-102.

**Originator.**

- Funds transfers, §4-4A-104.

**Originator's bank.**

- Funds transfers, §4-4A-104.

**Overhead expense.**

- Unfair practices, §4-75-209.

**Overissue.**

- Investment securities, §4-8-210.

**Owner.**

- Telephonic sellers, §4-99-103.

**Owns or licenses.**

- Personal information protection act, §4-110-103.

**Package.**

- Weights and measures, §4-18-301.

**Paid solicitor.**

- Solicitation of charitable contributions, §4-28-401.

**Parent organization.**

- Solicitation of charitable contributions, §4-28-401.

**Participant.**

- Connect Arkansas broadband program, §4-113-102.

**Participating shares.**

- Business corporations.
- Merger, §§4-26-1007, 4-27-1107.

**Partner.**

- Limited partnerships, §4-47-102.

**Partnership.**

- Partnerships, §4-46-101.

**Partnership agreement.**

- Limited partnerships, §4-47-102.
- Partnerships, §4-46-101.

**DEFINED TERMS —Cont'd****Partnership at will.**

- Partnerships, §4-46-101.

**Partnership interest.**

- Partnerships, §4-46-101.

**Party.**

- Negotiable instruments, §4-3-103.
- Nonprofit corporations.
- Indemnification, §4-33-850.
- Uniform commercial code, §4-1-201.

**Payment date.**

- Funds transfers, §4-4A-401.

**Payment intangible.**

- Secured transactions, §4-9-102.

**Payment order.**

- Funds transfers, §4-4A-103.

**Payor bank.**

- Bank deposits and collections, §4-4-105.

**Pay-per-call.**

- Mail and telephone solicitation sales, §4-95-102.

**Pay-per-call service.**

- Consumer protection, §4-98-102.

**PBM.**

- Fair disclosure of state funded payments for pharmacists' services act, §4-88-802.

**Per-call blocking.**

- Caller identification blocking by telephonic sellers, §4-99-301.

**Performing rights society.**

- Collection practices, §4-76-102.

**Per-line blocking.**

- Caller identification blocking by telephonic sellers, §4-99-301.

**Person.**

- Advertisements on school calendars, §4-88-501.
- Automobile dealers' anti-coercion, §4-75-402.
- Business corporations, §4-27-140.
- Caller identification blocking by telephonic sellers, §4-99-301.
- Consumer protection against computer spyware act, §4-111-102.
- Credit card solicitation on college campus, §4-104-201.
- Deceptive trade practices, §4-88-102.
- Franchises, §4-72-202.
- Fraudulent transfers, §4-59-201.
- Going out of business sales, §4-74-101.
- Lemon law, §4-90-403.
- Limited liability companies, §4-32-102.
- Limited partnerships, §4-47-102.
- Mail and telephone solicitation sales, §4-95-102.

**DEFINED TERMS —Cont'd****Person —Cont'd**

- Misappropriating social security numbers, §4-86-107.
  - Monopolies and restraint of trade, §4-75-316.
  - Motion pictures.
    - Unfair practices, §4-75-902.
  - Motor vehicle warranties, §4-90-403.
  - Nonprofit corporations, §4-33-140.
  - Notario or notario publico.
    - Advertising services using terms, §4-109-101.
  - Odometer regulations, §4-90-202.
  - Partnerships, §4-46-101.
  - Pet stores, §4-97-103.
  - Price gouging, §4-88-302.
  - Quality specifications for engine fuels, petroleum products and automotive lubricants, §4-108-203.
  - Registered agents, §4-20-102.
  - Rental purchases, §4-92-102.
  - Service contracts, §4-114-103.
  - Slamming in telecommunications industry, §4-88-401.
  - Solicitation of charitable contributions, §4-28-401.
  - Telephonic sellers, §4-99-103.
  - Theft of trade secrets, §4-75-601.
  - Trademarks and labels, §4-71-201.
  - Transfer of credit card debt, §4-107-201.
  - Unfair cigarette sales, §4-75-702.
  - Unfair practices, §4-75-213.
  - Uniform commercial code, §4-1-201.
  - Unincorporated nonprofit associations, §4-28-602.
  - Unsolicited commercial and sexually explicit electronic mail prevention act, §4-88-602.
  - Usurious consumer loans or credit sales, §4-57-108.
  - Weights and measures, §4-18-301.
- Personal information.**
- Personal information protection act, §4-110-103.
- Personal liability.**
- Limited partnerships, conversion and merger, §4-47-1101.
  - Partnerships, conversions and mergers, §4-46-901.
- Personally identifiable information.**
- Consumer protection against computer spyware act, §4-111-102.
- Person dissociated as a general partner.**
- Limited partnerships, §4-47-102.

**DEFINED TERMS —Cont'd****Person entitled to enforce.**

- Negotiable instruments, §4-3-301.

**Person entitled under the document.**

- Documents of title, §4-7-102.

**Person related to.**

- Secured transactions, §4-9-102.

**Petroleum products.**

- Quality specifications for engine fuels, petroleum products and automotive lubricants, §4-108-203.

**Petroleum products dealer,**  
§4-72-501.**Petroleum products distributor,**  
§§4-72-401, 4-72-501.**Petroleum products supplier,**  
§§4-72-401, 4-72-501.**Pharmacist.**

- Fair disclosure of state funded payments for pharmacists' services act, §4-88-802.

**Pharmacist services.**

- Fair disclosure of state funded payments for pharmacists' services act, §4-88-802.

**Pharmacy.**

- Drug samples, distribution of, §4-117-101.

- Fair disclosure of state funded payments for pharmacists' services act, §4-88-802.

**Pharmacy benefits manager.**

- Fair disclosure of state funded payments for pharmacists' services act, §4-88-802.

**Pharmacy benefits plan or program.**

- Fair disclosure of state funded payments for pharmacists' services act, §4-88-802.

**Phishing.**

- Consumer protection against computer spyware act, §4-111-102.

**Physical or mental impairment.**

- Deceptive trade practices, §4-88-201.

**Physician.**

- Drug samples, distribution of, §4-117-101.

**Place of business.**

- Franchises, §4-72-202.
- Secured transactions, §4-9-307.

**Plate.**

- Fine prints sales, §4-73-301.

**Possessory lien.**

- Secured transactions, §4-9-333.

**Practice of law.**

- Notario or notario publico.
  - Advertising services using terms, §4-109-101.

**DEFINED TERMS —Cont'd****Preemptive rights.**

Business corporations, §4-26-711.

**Preexisting business relationship.**

Unsolicited commercial and sexually explicit electronic mail prevention act, §4-88-602.

**Premiums.**

Service contracts, §4-114-103.

**Presentation.**

Letters of credit, §4-5-102.

**Presenter.**

Letters of credit, §4-5-102.

**Presenting bank.**

Bank deposits and collections, §4-4-105.

**Presentment.**

Negotiable instruments, §4-3-501.

**Present sale.**

Sale of goods, §4-2-106.

**Present value.**

Leases, UCC, §4-2A-103.

Uniform commercial code, §4-1-201.

**Primary standards.**

Weights and measures, §4-18-301.

**Principal.**

Sales representatives, §4-70-301.

Telephone sellers, §§4-99-102, 4-99-103.

**Principal obligor.**

Negotiable instruments, §4-3-103.

**Principal office.**

Business corporations, §4-27-140.

Limited partnerships, §4-47-102.

Nonprofit corporations, §4-33-140.

**Principal place of business.**

Business corporations, §4-26-102.

**Private organic rules.**

Registered agents, §4-20-102.

**Prize, §4-102-102.****Proceeding.**

Business corporations, §4-27-140.

Nonprofit corporations, §4-33-140.

Indemnification, §4-33-850.

**Proceeds.**

Secured transactions, §4-9-102.

**Proceeds of a letter of credit,**

§4-5-114.

**Production-money crops.**

Secured transactions, §4-9-102.

**Production-money obligation.**

Secured transactions, §4-9-102.

**Production of crops.**

Secured transactions, §4-9-102.

**Product promoter.**

Mail and telephone solicitation sales, §4-95-102.

**DEFINED TERMS —Cont'd****Professional service.**

Dental corporations, §4-29-402.

Limited liability companies, §4-32-102.

Medical corporations, §4-29-302.

Professional corporations, §4-29-202.

**Professional telemarketer.**

Solicitation of charitable contributions, §4-28-401.

**Project.**

Water authorities, §4-35-103.

**Promise.**

Negotiable instruments, §4-3-103.

**Promissory note.**

Secured transactions, §4-9-102.

**Promotion.**

Deceptive trade practices, §4-88-102.

**Proper identification.**

Credit report security freezes, §4-112-102.

**Property.**

Fraudulent transfers, §4-59-201.

Partnerships, §4-46-101.

**Proposal.**

Secured transactions, §4-9-102.

**Proprietor.**

Copyright collection practices, §4-76-102.

**Prospective purchaser.**

Telephonic sellers, §4-99-103.

**Protected purchasers.**

Investment securities, §4-8-303.

**Prove.**

Funds transfers, §4-4A-105.

Negotiable instruments, §4-3-103.

**Provider.**

Motor vehicle service contracts, §4-90-502.

Service contracts, §4-114-103.

**Provider fee.**

Service contracts, §4-114-103.

**Public benefit corporation.**

Nonprofit corporations, §4-33-140.

**Public-finance transaction.**

Secured transactions, §4-9-102.

**Public funds.**

Nonprofit organizations, §4-28-103.

**Publicly post.**

Misappropriating social security numbers, §4-86-107.

**Public organic document.**

Registered agents, §4-20-102.

**Pump.**

Weights and measures, §4-18-344.

**Purchase.**

Automobile dealers' anti-coercion, §4-75-402.

Leases, UCC, §4-2A-103.

**DEFINED TERMS —Cont'd****Purchase —Cont'd**

Uniform commercial code, §4-1-201.

**Purchase-money collateral.**

Secured transactions, §4-9-103.

**Purchase-money obligation.**

Secured transactions, §4-9-103.

**Purchase price.**

Motor vehicle warranties, §4-90-403.

**Purchaser.**

Telephonic sellers, §4-99-103.

Uniform commercial code, §4-1-201.

**Pursuant to commitment.**

Secured transactions, §4-9-102.

**Pyramiding devices.**

Deceptive trade practices, §4-88-109.

**Qualified corporation.**

Water authorities, §4-35-103.

**Qualified foreign entity.**

Registered agents, §4-20-102.

**Random weight package.**

Weights and measures, §4-18-301.

**Reasonable attempt to repair.**

Assistive device warranty, §4-105-201.

**Receipt.**

Sale of goods, §4-2-103.

**Receiving bank.**

Funds transfers, §4-4A-103.

**Record.**

Letters of credit, §4-5-102.

Limited partnerships, §4-47-102.

Negotiable instruments, §4-3-103.

Personal information protection act,  
§4-110-103.

Pet stores, §4-97-103.

Registered agents, §4-20-102.

Secured transactions, §4-9-102.

Uniform commercial code, §4-1-201.

Unincorporated nonprofit associations,  
§4-28-602.

**Record date.**

Business corporations, §4-27-140.

Nonprofit corporations, §4-33-140.

**Record shareholder.**

Business corporations.

Dissenters' rights, §4-27-1301.

**Refund anticipation check,**

§4-116-102.

**Refund anticipation loan, §4-116-102.****Refund anticipation loan fee,**

§4-116-102.

**Registered agent, §4-20-102.****Registered agent filing, §4-20-102.****Registered form.**

Investment securities, §4-8-102.

**Registered organization.**

Secured transactions, §4-9-102.

**DEFINED TERMS —Cont'd****Registered service agent.**

Weights and measures, §4-18-301.

**Registrant.**

Trademarks and labels, §4-71-201.

**Reimbursement insurance policy.**

Service contracts, §4-114-103.

**Reinstatement period.**

Rental purchases, §4-92-102.

**Relative.**

Fraudulent transfers, §4-59-201.

**Religious corporation.**

Nonprofit corporations, §4-33-140.

**Remedy.**

Uniform commercial code, §4-1-201.

**Remitter.**

Negotiable instruments, §4-3-103.

**Remotely-created item.**

Negotiable instruments, §4-3-103.

**Rental-purchase agreement,  
§4-92-102.****Repair.**

Odometer regulations, §4-90-202.

**Repair facility.**

Aftermarket crash parts, §4-90-302.

**Repair or reconstruction services.**

Price gouging, §4-88-302.

**Replace.**

Odometer regulations, §4-90-202.

**Replacement motor vehicle.**

Motor vehicle warranties, §4-90-403.

**Representative.**

Uniform commercial code, §4-1-201.

**Represented entity.**

Registered agents, §4-20-102.

**Represented person.**

Negotiable instruments, §4-3-307.

**Reproduction.**

Fine prints sales, §4-73-301.

**Request.**

Secured transactions, §§4-9-210,  
4-9-616.

**Request for an accounting.**

Secured transactions, §4-9-210.

**Request regarding a list of  
collateral.**

Secured transactions, §4-9-210.

**Request regarding a statement of  
account.**

Secured transactions, §4-9-210.

**Required information.**

Limited partnerships, §4-47-102.

**Responsibility.**

Negotiable instruments.

Fraudulent indorsement by  
employee, §4-3-405.

**Restaurant franchise.**

Procedural fairness, §4-72-601.

**DEFINED TERMS —Cont'd****Retailer.**

Farm equipment retailer franchise protection, §4-72-301.

Unfair cigarette sales, §4-75-702.

**Retail pet store,** §4-97-103.**Retail sale.**

Unfair cigarette sales, §4-75-702.

**Retail value.**

Prize promotion, §4-102-102.

**Retained earnings.**

Business corporations, §4-26-616.

**Rights.**

Uniform commercial code, §4-1-201.

**Royalties.**

Copyright collection practices, §4-76-102.

**Run.**

Motion pictures.

Unfair practices, §4-75-902.

**Sale.**

Sale of goods, §4-2-106.

Unfair cigarette sales, §4-75-702.

Weights and measures, §4-18-301.

**Sale, transfer or assignment.**

Franchises, §4-72-202.

**Sale from bulk.**

Weights and measures, §4-18-301.

**Salesperson.**

Telephonic seller, §4-99-103.

**Sales representative,** §4-70-301.**School calendar.**

Advertisements on school calendars, §4-88-501.

**Secondary obligor.**

Negotiable instruments, §4-3-103.

Secured transactions, §4-9-102.

**Secondary standards.**

Weights and measures, §4-18-301.

**Second run.**

Motion pictures, §4-75-902.

**Secretary.**

Business corporations, §4-27-140.

Nonprofit corporations, §4-33-140.

Trademarks, §4-71-201.

**Secured party.**

Secured transactions, §4-9-102.

**Securities.**

Investment securities, §4-8-102.

**Securities account,** §4-8-501.**Securities intermediary,** §4-8-102.**Securities intermediary's jurisdiction.**

Investment security, §4-8-110.

**Security agreement.**

Secured transactions, §4-9-102.

**Security certificate,** §4-8-102.**Security entitlement,** §4-8-102.**DEFINED TERMS —Cont'd****Security freeze.**

Credit report security freezes, §4-112-102.

**Security interest.**

Motor vehicle transfers, §4-100-101.

Uniform commercial code, §4-1-201.

**Security procedure.**

Funds transfers, §4-4A-201.

**Sell.**

Automobile dealers' anti-coercion, §4-75-402.

Unfair cigarette sales, §4-75-702.

Weights and measures, §4-18-301.

**Sell at retail.**

Unfair cigarette sales, §4-75-702.

**Sell at wholesale.**

Unfair cigarette sales, §4-75-702.

**Seller.**

Health spa consumer protection, §4-94-102.

Home solicitation sales, §4-89-102.

Sale of goods, §4-2-103.

Telephonic sellers, §4-99-103.

**Send.**

Secured transactions, §4-9-102.

Uniform commercial code, §4-1-201.

**Sender.**

Funds transfers, §4-4A-103.

**Service.**

Deceptive trade practices, §4-88-102.

Home solicitation sales, §4-89-102.

Price gouging, §4-88-302.

**Service contract,** §4-114-103.

Motor vehicle service contracts, §4-90-502.

**Service contract holder,** §4-114-103.

Motor vehicle service contracts, §4-90-502.

**Service contracts,** §4-90-502.

Affiliate, §4-90-503.

**Service fee.**

Fair gift card act, §4-88-702.

**Service mark.**

Trademarks, §4-71-201.

**Settle.**

Bank deposits and collections, §4-4-104.

**Sexually explicit electronic mail.**

Unsolicited commercial and sexually explicit electronic mail prevention act, §4-88-602.

**Shareholder.**

Business corporations, §§4-26-102, 4-27-140.

Dental corporations, §4-29-402.

Dissenters' rights, §4-27-1301.

Medical corporations, §4-29-302.

**DEFINED TERMS —Cont'd****Shareholder —Cont'd**

Professional corporations, §4-29-202.

**Shares.**

Business corporations, §§4-26-102,  
4-27-140.

**Shipper.**

Documents of title, §4-7-102.

**Sign.**

Documents of title, §4-7-102.  
Limited partnerships, §4-47-102.  
Registered agents, §4-20-102.

**Signed.**

Fine prints sales, §4-73-301.  
Negotiable instruments, §§4-3-602,  
4-3-604.  
Uniform commercial code, §4-1-201.

**Slamming.**

Telecommunications industry,  
§4-88-401.

**Software.**

Secured transactions, §4-9-102.

**Sold.**

Automobile dealers' anti-coercion,  
§4-75-402.  
Quality specifications for engine fuels,  
petroleum products and  
automotive lubricants, §4-108-203.

**Solicitation.**

Deceptive trade practices, §4-88-102.  
Solicitation of charitable contributions,  
§4-28-401.

**Special indorsement.**

Negotiable instruments, §4-3-205.

**Sponsor.**

Prize promotion, §4-102-102.

**Standard package.**

Weights and measures, §4-18-301.

**Standard weight.**

Weights and measures, §4-18-301.

**State.**

Business corporations, §4-27-140.  
Limited liability companies, §4-32-102.  
Limited partnerships, §4-47-102.  
Nonprofit corporations, §4-33-140.  
Partnerships, §4-46-101.  
Secured transactions, §4-9-102.  
Uniform commercial code, §4-1-201.  
Unincorporated nonprofit associations,  
§4-28-602.

**State agency.**

Personal information protection act,  
§4-110-103.

**Stated capital.**

Business corporations, §4-26-102.

**State financial assistance.**

Nonprofit organizations, §4-28-104.

**DEFINED TERMS —Cont'd****Statement.**

Partnerships, §4-46-101.

**Statement of authority.**

Unincorporated nonprofit associations,  
§4-28-607.

**State of emergency.**

Price gouging, §4-88-302.

**Store gift card.**

Fair gift card act, §4-88-702.

**Sublease.**

Leases, UCC, §4-2A-103.

**Subscriber.**

Business corporations, §§4-26-102,  
4-27-140.  
Slamming in telecommunications  
industry, §4-88-401.

**Subsequent runs.**

Motion pictures, §4-75-902.

**Substantially limits.**

Deceptive trade practices, §4-88-201.

**Successor of a beneficiary.**

Letters of credit, §4-5-102.

**Supplier.**

Leases, UCC, §4-2A-103.

**Supply contract.**

Leases, UCC, §4-2A-103.

**Supporting obligation.**

Secured transactions, §4-9-102.

**Surety.**

Uniform commercial code, §4-1-201.

**Surplus.**

Business corporations, §4-26-102.

**Surviving organization.**

Corporate mergers, §§4-26-1001,  
4-27-1101.  
Limited liability companies,  
§4-32-1201.  
Limited partnerships, conversion and  
merger, §4-47-1101.  
Partnerships, conversions and  
mergers, §4-46-901.  
Unincorporated nonprofit associations,  
mergers, §4-28-630.

**Suspends payments.**

Bank deposits and collections,  
§4-4-104.

**Tangible chattel paper.**

Secured transactions, §4-9-102.

**Telemarketer.**

Submitting for check or draft for  
payment, §4-99-203.

**Telephone solicitation.**

Caller identification blocking the  
telephonic sellers, §4-99-301.

**Telephonic seller, §4-99-103.****Teller's check.**

Negotiable instruments, §4-3-104.

**DEFINED TERMS —Cont'd****Termination.**

Leases, UCC, §4-2A-103.

Sale of goods, §4-2-106.

**Termination statement.**

Secured transactions, §4-9-102.

**Terms.**

Uniform commercial code, §4-1-201.

**Theatre.**

Unfair practices, §4-75-902.

**Third party.**

Motor vehicle transfers, §4-100-101.

**Title.**

Odometer regulations, §4-90-202.

**Trademark, §4-71-201.****Trade name.**

Trademarks and labels, §4-71-201.

**Trade screening.**

Motion pictures.

Unfair practices, §4-75-902.

**Trade secret.**

Theft of, §4-75-601.

**Transaction account.**

Fair gift card act, §4-88-702.

**Transfer.**

Fraudulent transfers, §4-59-201.

Limited partnerships, §4-47-102.

Motor vehicle transfers, §4-100-101.

Odometer regulations, §4-90-202.

Partnerships, §4-46-101.

**Transferable interest.**

Limited partnerships, §4-47-102.

Registered agents, §4-20-102.

**Transferee.**

Limited partnerships, §4-47-102.

**Transfer statement.**

Secured transactions, §4-9-619.

**Transmitting utility, §4-19-102.**

Secured transactions, §4-9-102.

**Transportation, freight and storage services.**

Price gouging, §4-88-302.

**Traveler's check.**

Negotiable instruments, §4-3-104.

**Treasury shares.**

Business corporations, §4-26-102.

**Type.**

Registered agents, §4-20-102.

**Unauthorized signature.**

Uniform commercial code, §4-1-201.

**Uncertificated security.**

Investment securities, §4-8-102.

**Unincorporated nonprofit association, §4-28-602.****United States.**

Business corporations, §4-27-140.

Nonprofit corporations, §4-33-140.

**DEFINED TERMS —Cont'd****Unsolicited.**

Unsolicited commercial and sexually explicit electronic mail prevention act, §4-88-602.

**Usage of trade.**

Uniform commercial code, §4-1-303.

**Use.**

Trademarks, §4-71-201.

**Valid lien.**

Fraudulent transfers, §4-59-201.

**Victim of identity theft.**

Credit report security freezes, §4-112-102.

**Vote.**

Nonprofit corporations, §4-33-140.

**Voting group.**

Business corporations, §4-27-140.

**Voting power.**

Nonprofit corporations, §4-33-140.

**Voting rights.**

Business corporations, §4-26-711.

**Voting shares.**

Business corporations.

Merger, §§4-26-1007, 4-27-1107.

**Warehouse.**

Documents of title, §4-7-102.

**Warehouse receipt.**

Uniform commercial code, §4-1-201.

**Warranty.**

Motor vehicle warranties, §4-90-403.

Service contracts, §4-114-103.

**Wastewater project.**

Water authorities, §4-35-103.

**Wastewater treatment plant.**

Water authorities, §4-35-103.

**Water authority, §4-35-103.****Water users.**

Water authorities, §4-35-103.

**Weight.**

Weights and measures, §4-18-301.

**Weights and measures, §4-18-301.****Wholesale dealer and distributor.**

Automobile dealers' anti-coercion, §4-75-402.

Beer and light wine, §4-29-409.

**Wholesaler.**

Unfair cigarette sales, §4-75-702.

**Wholesale sales.**

Unfair cigarette sales, §4-75-702.

**Written or writing.**

Uniform commercial code, §4-1-201.

**DENTAL CORPORATIONS.****Amendments.**

Certificate of registration, §4-29-409.

**Appeals.**

Suspension or revocation of certificate of registration, §4-29-411.

Notice of appeal, §4-29-411.

**DENTAL CORPORATIONS —Cont'd****Applicability of business**

corporation act, §4-29-403.

**Assignments.**

Certificate of registration, §4-29-409.

**Business corporation act.**

Applicability, §4-29-403.

**Certificate of registration.**

Amendment, §4-29-409.

Application, §4-29-409.

Assignment, §4-29-409.

Fees, §4-29-409.

Issuance, §4-29-409.

Posting, §4-29-409.

Required, §4-29-409.

Suspension or revocation, §4-29-410.

Appeals, §4-29-411.

Notice, §4-29-411.

Hearing, §4-29-410.

Notice, §4-29-410.

**Citation of act, §4-29-401.****Construction and interpretation.**

Business corporation act.

Applicability of provisions,  
§4-29-403.

Dentist-patient unaltered, §4-29-404.

**Conversion to business**

corporations, §4-29-204.

**Corporate name, §4-29-406.****Definitions, §4-29-402.****Dentist-patient relationship.**Effect of act upon applicable law,  
§4-29-404.**Directors.**

License requirements, §4-29-407.

**Employees.**

License requirements, §4-29-408.

**Fees.**

Annual renewal, §4-29-409.

Certificate of registration, §4-29-409.

Annual renewal, §4-29-409.

**Formation of corporation.**

Procedure, §4-29-405.

**Hearings.**Suspension or revocation of certificate  
of registration, §4-29-410.**Licenses.**

Employees, §4-29-408.

Officers, directors and shareholders,  
§4-29-407.**Limited liability companies.**Medical or dental limited liability  
companies, §4-32-1401.**Names.**

Corporate name, §4-29-406.

**Notice.**Suspension or revocation of certificate  
of registration, §4-29-410.

Appeals, §4-29-411.

**DENTAL CORPORATIONS —Cont'd**  
**Officers.**

License requirements, §4-29-407.

**Offices.**

Change of location.

Amendment of certificate, §4-29-409.

**Posting certificate, §4-29-409.****Purposes of corporations, §4-29-405.****Shareholders.**Deceased or disqualified shareholders,  
§4-29-411.

License requirements, §4-29-407.

Shares of deceased or disqualified  
shareholders, §4-29-411.**Title of act, §4-29-401.****DENTAL OR MEDICAL LIMITED  
LIABILITY COMPANIES,  
§4-32-1401.****DEPOSITS.****Secured transactions.**Deposit accounts generally, §§4-9-101  
to 4-9-709.**DERIVATIVE ACTIONS.****Shareholder actions, §4-26-714.****DETINUE.****Sale of goods, UCC.**Buyer's right to detinue of goods,  
§4-2-716.**DIAMONDS.****Sale of fracture-filled and  
clarity-enhanced diamonds.**

Duty of merchant, §4-101-201.

**DILUTION OF TRADEMARK,  
§4-71-213.****DISABILITIES, INDIVIDUALS  
WITH.****Deceptive trade practices.**Enhanced penalties for targeting  
individuals with disabilities.

Cause of action, §4-88-204.

Civil penalties, §4-88-202.

Determination, §4-88-203.

Definitions, §4-88-201.

Disposition of funds obtained from  
civil penalties, §4-88-202.

Education initiatives, §4-88-205.

Fund, §4-88-207.

Referrals for abuse, neglect and  
exploitation, §4-88-206.**DISASTERS.****Price gouging, §§4-88-301 to 4-88-305.****DISCONTINUING BUSINESS  
SALES.****General provisions, §§4-74-101 to  
4-74-111.**

**DISCOUNT CARDS.**

**Health-related discount cards not insurance**, §§4-106-201 to 4-106-205.

Action for violation, §4-106-202.

Cancellation of contract and full refund.

Buyer's right, time for exercising, §4-106-205.

Defendant required to testify an action for violation, §4-106-202.

Designation of agent for service of process, §4-106-203.

Eye or vision care services, provisions not applicable, §4-106-204.

Injunctions, §4-106-202.

Penalty, §4-106-202.

Prohibited practices, §4-106-201.

Registration of agent for service of process, §4-106-203.

Statute of limitations for actions for violations, §4-106-202.

Venue of action for violation, §4-106-202.

**DISCRIMINATION.****Consumer credit.**

Equal consumer credit act, §§4-87-101 to 4-87-105.

**DISHONOR.****Documentary drafts.**

Bank deposits and collections.

Duty to notify customer, §4-4-501.

Privilege of presenting bank to deal with goods, §4-4-504.

Reporting reasons, §4-4-503.

**Letters of credit.**

Issuer's rights and obligations, §4-5-108.

Wrongful dishonor, §4-5-111.

**Negotiable instruments.**

Evidence, §4-3-505.

Notice.

Evidence, §4-3-505.

Excuse.

Presentment, §4-3-404.

How given, §4-3-503.

Protest defined, §4-3-505.

Rules governing, §4-3-502.

Presumption, §4-3-505.

Protest defined, §4-3-505.

Rules governing, §4-3-502.

Special provisions, §4-3-502.

**DISSOLUTION.****Administrative dissolution of corporations.**

Effect, §4-33-1421.

**DISSOLUTION —Cont'd****Administrative dissolution of corporations —Cont'd**

Grounds, §4-33-1420.

Procedure, §4-33-1421.

Reinstatement following, §4-33-1422.

**Judicial dissolution of corporations.**

Custodianship, §4-33-1432.

Decree of dissolution, §4-33-1433.

Grounds, §4-33-1430.

Procedure, §4-33-1431.

Receivership, §4-33-1432.

**Limited liability company**, §§4-32-901 to 4-32-908.

**Limited partnerships**, §§4-47-801 to 4-47-812.

**Partnerships**, §§4-46-801 to 4-46-807.

**Unincorporated nonprofit associations**, §4-28-628.

**DOCUMENTARY DRAFTS.**

**Bank deposits and collections**, §§4-4-501 to 4-4-504.

Dishonor.

Duty to notify customer, §4-4-501.

Privilege of presenting bank to deal with goods, §4-4-504.

Reporting reasons, §4-4-503.

Generally, §§4-4-101 to 4-4-504.

On arrival drafts, §4-4-502.

Presentment.

Duty to send for presentment, §4-4-501.

**DOCUMENTS OF TITLE**, §§4-7-101 to 4-7-704.

**Alteration.**

Bills of lading, §4-7-306.

Warehouse receipts, §4-7-208.

**Applicability of provisions**, §4-7-703.

**Bills of lading**, §§4-7-301 to 4-7-309.

Altered bills, §4-7-306.

Care owing from carrier, §4-7-309.

Consignments.

Reconsignment, §4-7-303.

Contractual limitation of carrier's liability, §4-7-309.

Delivery of goods, §4-7-303.

Good faith delivery pursuant to title, §4-7-404.

Obligation of bailee to deliver, §4-7-403.

Description of goods, §4-7-301.

Destination bills, §4-7-305.

Diversion of goods, §4-7-303.

Duplicates, §4-7-402.

Handling of goods.

Improper handling, §4-7-301.

**DOCUMENTS OF TITLE —Cont'd****Bills of lading —Cont'd**

Irregularities in issue or conduct of issuer, §4-7-401.

Lien of carrier, §4-7-307.

Enforcement, §4-7-308.

Negotiability, §4-7-104.

Negotiation.

Generally, §§4-7-501 to 4-7-509.

Overissue, §4-7-402.

Receipt of goods.

Liability for nonreceipt, §4-7-301.

Sets, §4-7-304.

Through bills and similar documents of title, §4-7-302.

Transfer.

Generally, §§4-7-501 to 4-7-509.

**Citation of article.**

Short title, §4-7-101.

**Claims.**

Interpleader.

Conflicting claims, §4-7-603.

**Consignments.**

Bills of lading.

Reconsignment, §4-7-303.

**Contracts.**

Bills of lading.

Limitation of carrier's liability, §4-7-309.

When adequate compliance with obligations of commercial contract, §4-7-509.

**Definitions, §4-7-102.**

General commercial code definitions, §4-1-201.

**Delivery of goods.**

Bills of lading, §4-7-303.

Good faith delivery pursuant to title, §4-7-404.

Obligation of bailee to deliver, §4-7-403.

Excuses, §4-7-403.

Negotiation and transfer.

Stoppage of delivery.

Rights acquired in absence of due negotiation, §4-7-504.

Warehouse receipts.

Good faith delivery pursuant to title, §4-7-404.

Obligation of bailee to deliver, §4-7-403.

**Description of goods.**

Bills of lading, §4-7-301.

Warehouse receipts, §4-7-203.

**Destroyed documents, §4-7-601.****Diversion of goods.**

Bills of lading, §4-7-303.

**DOCUMENTS OF TITLE —Cont'd****Diversion of goods —Cont'd**

Rights acquired in absence of due negotiation.

Effect of diversion, §4-7-504.

**Effective date of provisions, §4-7-701.****Electronic documents.**

Control, §4-7-106.

Reissuance in alternative medium, §4-7-105.

**Forms.**

Warehouse receipts, §4-7-202.

**Fungible goods.**

Warehouse receipts, §4-7-207.

**Handling of goods.**

Bills of lading.

Improper handling, §4-7-301.

**Interpretation and construction.**

Relationship of article to treaty or statute, §4-7-103.

**Liens.**

Carrier's lien, §4-7-307.

Enforcement, §4-7-308.

Lien of warehouse, §4-7-210.

Injunction required for attachment.

Goods covered by negotiable document, §4-7-602.

Warehouse's lien, §4-7-209.

Enforcement, §4-7-210.

**Lost documents, §4-7-601.****Negotiability, §4-7-104.****Negotiation and transfer, §§4-7-501 to 4-7-509.**

Delivery of goods.

Stoppage of delivery.

Rights acquired in absence of due negotiation, §4-7-504.

Diversion of goods.

Rights acquired in absence of due negotiation.

Effect of diversion, §4-7-504.

Due negotiation.

Requirements, §4-7-501.

Rights acquired, §4-7-502.

Form of negotiation, §4-7-501.

Indorsements.

Indorser not guarantor for other parties, §4-7-505.

Rights acquired.

Absence of due negotiation, §4-7-504.

Due negotiation, §4-7-502.

Title to goods.

Defeated in certain cases, §4-7-503.

Warranties, §4-7-507.

Collecting bank's warranties as to documents, §4-7-508.

**DOCUMENTS OF TITLE —Cont'd****Receipt of goods.**

Bills of lading.

Liability for nonreceipt, §4-7-301.

Warehouse receipts.

Liability for nonreceipt, §4-7-203.

**Savings clause, §4-7-704.****Separation of goods.**

Warehouse receipts, §4-7-207.

**Stolen documents, §4-7-601.****Tangible documents.**

Bills of lading, not to be issued as set of parts, §4-7-304.

Reissuance in alternative medium to electronic documents, §4-7-105.

**Title of article.**

Short title, §4-7-101.

**Transfer.**

Generally, §§4-7-501 to 4-7-509.

**United States treaty or statute.**

Relationship of article, §4-7-103.

**Warehouse receipts.**

Altered receipts, §4-7-208.

Care owing from warehouse, §4-7-204.

Contractual limitation of warehouse's liability, §4-7-204.

Delivery of goods.

Good faith delivery pursuant to title, §4-7-404.

Obligation of bailee to deliver, §4-7-403.

Description of goods.

Liability for misdescription, §4-7-203.

Duplicates, §4-7-402.

Forms, §4-7-202.

Fungible goods, §4-7-207.

Generally, §§4-7-201 to 4-7-210.

Government bond.

Storage under, §4-7-201.

Irregularities in issue or conduct of issuer, §4-7-401.

Liability for omissions, §4-7-202.

Lien of warehouse, §4-7-209.

Enforcement, §4-7-210.

Negotiation.

Generally, §§4-7-501 to 4-7-509.

Overissue, §4-7-402.

Receipt of goods.

Liability for nonreceipt, §4-7-203.

Separation of goods, §4-7-207.

Termination of storage.

Warehouse's option, §4-7-206.

Terms.

Essential terms, §4-7-202.

Optional terms, §4-7-202.

**DOCUMENTS OF TITLE —Cont'd****Warehouse receipts —Cont'd**

Title defeated in certain cases, §4-7-205.

Transfer.

Generally, §§4-7-501 to 4-7-509.

Who may issue, §4-7-201.

**Warranties.**

Negotiation and transfer, §4-7-507.

Collecting bank's warranties as to documents, §4-7-508.

**DOGGIE LEMON LAW, §4-97-105.****DOGS.**

Lemon law, §4-97-105.

Retail pet stores, §§4-97-101 to 4-97-109.

Warranties on pets, §4-97-105.

**DONATIONS.**

Charitable contributions, §§4-28-401 to 4-28-416.

DO NOT CALL LISTS, §§4-99-401 to 4-99-408.

**DOOR TO DOOR SALES.**

Home solicitation sales, §§4-89-101 to 4-89-110.

**DRAFTS.**

Acceptance varying draft, §4-3-410.

**Contracts.**

Defined, §4-3-104.

Sale of goods.

Documents against which draft is drawn.

When deliverable, §4-2-514.

Dishonor, §4-3-502.

**Documentary drafts.**

Bank deposits and collections.

Dishonor.

Duty to notify customer, §4-4-501.

Privilege of presenting bank to deal with goods, §4-4-504.

Reporting reasons, §4-4-503.

Generally, §§4-4-101 to 4-4-504.

Presentment.

Duty to send, §4-4-501.

On arrival drafts, §4-4-502.

**Telemarketers submitting for payment.**

Express consent of consumer required, §4-99-203.

Unaccepted drafts, §4-3-408.

**DRIVERS' LICENSES.****Numbers.**

Personal information protection act, §§4-110-101 to 4-110-108.

**E****ELECTRONIC CHATTEL PAPER.****Control, perfection by**, §4-9-314.**Secured transactions.****Control**, §4-9-105.**Duties of secured party having control of collateral**, §4-9-208.**ELECTRONIC FUNDS TRANSFERS.****Commercial code**, §§4-4A-101 to 4-4A-507.**Telemarketers submitting check for payment.****Express consent of consumer required**, §4-99-203.**ELECTRONIC TRANSACTIONS.****Commercial code.****Electronic signatures in global and national commerce act.****Relation of commercial code to**, §4-1-108.**Funds transfers**, §§4-4A-101 to 4-4A-507.**Personal information protection act**, §§4-110-101 to 4-110-108.**Registered agents.****Electronic signatures in global and national commerce act, relationship**, §4-20-117.**ELEEMOSYNARY INSTITUTIONS.****Nonprofit corporations (1987)**, §§4-28-201 to 4-28-225.**Nonprofit corporations (1993)**, §§4-33-101 to 4-33-1707.**E-MAIL.****Spam e-mail**, §§4-88-601 to 4-88-607.**Authority of providers**, §4-88-604.**Blocking receipt.****Authority of providers**, §4-88-604.**Civil action.****Damages, costs and attorneys' fees, defense**, §4-88-606.**Criminal penalty**, §4-88-605.**Definitions**, §4-88-602.**Enforcement of provisions**, §4-88-607.**Notice by recipient not to send future communications**, §4-88-603.**Preexisting business or personal relationship with recipient.****Commercial mail not unsolicited**, §4-88-603.**Requirements for sending**, §4-88-603.**Short title**, §4-88-601.**Unsolicited commercial and sexually explicit electronic mail prevention act**, §§4-88-601 to 4-88-607.**EMERGENCIES.****Price gouging during emergencies or disasters**, §§4-88-301 to 4-88-305.**Definitions**, §4-88-302.**Penalties, remedies and enforcement**, §4-88-304.**Preemption**, §4-88-305.**Prohibited practices**, §4-88-303.**Taking unfair advantage of consumers**, §4-88-301.**EMINENT DOMAIN.****Water authorities**, §4-35-210.**ENDORSEMENTS.****Bank deposits and collections.****Collection of items by depositary and collecting banks.****Items endorsed "pay any bank,"** §4-4-201.**Missing endorsements.****Supplying**, §4-4-205.**Investment securities**, §4-8-304.**Effect of guaranteeing**, §4-8-306.**Registration of securities**, §§4-8-401, 4-8-402.**ESTATES.****Statute of frauds.****Assignment.****Compliance of statute required**, §4-59-102.**Violation of statute.****Effect**, §4-59-102.**EVIDENCE.****Assumed names.****Business under assumed name.****Certificate setting forth name.****Certified copy of certificate as presumptive evidence**, §4-70-205.**Cigarettes and tobacco products.****Costs.****Sales at less than cost.****Advertisements**, §4-75-708.**Unfair cigarette sales**, §4-75-711.**Commercial code.****Third-party documents.****Prima facie evidence by**, §4-1-307.**Consumer protection.****Court order for production of evidence**, §4-88-112.**Trade secrets.****Holding evidence in camera**, §4-88-111.**Contracts.****Sale of goods.****Breaches with respect to accepted goods**, §4-2-607.

**EVIDENCE —Cont'd****Contracts —Cont'd****Sale of goods —Cont'd**

Disputed goods.

Preserving evidence, §4-2-515.

Parol or extrinsic evidence, §4-2-202.

Price.

Proof of market price, §4-2-723.

Admissibility of market quotations, §4-2-724.

**Corporations.**

Certificates of secretary of state to be received in evidence, §4-26-106.

Documents.

Evidentiary effect of copy of filed document, §4-27-127.

**Investment securities, §4-8-114.****Leases.**

Commercial code.

Extrinsic evidence, §4-2A-202.

**Limited liability companies.**

Admissions or representations of members and managers, §4-32-302.

Certificates of existence, §4-32-1311.

Copies of filed documents, §4-32-1310.

Legality of organization and formation of company.

Articles of organization, §4-32-206.

**Monopolies and restraint of trade.**

Automobile dealer's anti-coercion act.

Exclusive financing agreements.

Threats as prima facie evidence, §4-75-409.

**Negotiable instruments.**

Notice of dishonor, §4-3-505.

Parol evidence.

Other agreements affecting instrument, §4-3-117.

**Nonprofit corporations (1993).**

Conditions precedent to incorporation, §4-33-203.

Copy of filed document, §4-33-127.

**EXECUTION OF JUDGMENTS.****Bills of lading.**

Lien on goods covered by a negotiable document, §4-7-602.

**Documents of title.**

Lien on goods covered by a negotiable document, §4-7-602.

**Limited partnerships.**

General partners, execution of judgments against, §4-47-405.

**Partnerships.**

Against assets of partner, §4-46-307.

**Warehouse receipts.**

Lien on goods covered by a negotiable document, §4-7-602.

**EXECUTORS AND****ADMINISTRATORS.****Limited liability companies.**

Company engaged in practice of law acting as, §4-32-307.

Powers as to deceased member's interest, §4-32-707.

**Statute of frauds.**

Contracts charging representative personally, §4-59-101.

**EXPRESS WARRANTIES.****Assistive devices, §§4-105-201 to 4-105-206.****Leases, commercial code, §4-2A-210.**

Third-party beneficiaries, §4-2A-216.

**Sale of goods, UCC, §4-2-313.**

Cumulation and conflict, §4-2-314.

Exclusions, §4-2-316.

Modification, §4-2-316.

Third-party beneficiaries, §4-2-318.

**F****FACTORING CREDIT CARDS,**

§§4-59-501 to 4-59-503.

**FAIR DISCLOSURE OF STATE FUNDED PAYMENTS FOR****PHARMACISTS' SERVICES ACT,** §§4-88-801 to 4-88-804.**FAIR GIFT CARD ACT, §§4-88-701 to 4-88-706.****FAIRS.****Agricultural and mechanical fair associations.**

Corporations.

Provisions applicable to, §4-28-101.

**FARM MACHINERY.****Hour meters on farm machinery,**

§§4-96-201, 4-96-202.

Alteration prohibited, §4-96-201.

Conspiracy to violate subchapter, §4-96-202.

Penalties for violations, §4-96-202.

Tampering prohibited, §4-96-201.

**FARMS AND FARMING.****Security interest in farm products.**

Failure to disclose person with, §4-56-102.

Financing statement.

Effectiveness of filed record, §4-9-510.

Filing office, §4-9-501.

**F.A.S.****Sale of goods, UCC, §4-2-319.**

**FEES.****Assumed names.**

- Business under assumed name.
- Certificate setting forth name.
- Fee of clerk for indexing and filing, §4-70-206.

**Cooperative associations.**

- Payment to secretary of state, §4-30-108.

**Corporations.**

- County clerk, §4-26-1203.
- Mutual corporations, §4-26-1204.
- Secretary of state.
- Business corporations, §§4-26-1202, 4-27-122, 4-27-1705.
- Nonprofit organizations, §§4-28-102, 4-28-223.

**Credit card processing services.**

- Prohibitions, §4-115-101.

**Credit report security freezes.**

- Fees charged by agency, §4-112-108.

**Dental corporations.**

- Certificate of registration, §4-29-409.
- Annual renewal, §4-29-409.

**Foreign business trusts, filing fees,**  
§4-31-406.**Fund-raising counsel, registration,**  
§4-28-406.**Gift cards.**

- Unfair and deceptive acts and practices, §4-88-703.

**Going out of business sales.**

- Licenses.
- Application for license, §4-74-106.

**Limited liability companies.**

- Filing, service and copying fees, §4-32-1301.

**Limited partnerships.**

- Filing fees, §§4-47-1301, 4-47-1302.

**Nonprofit corporations.**

- Members, §4-28-210.
- Payment to secretary of state, §4-28-223.

**Nonprofit corporations (1993).**

- Filing, service and copying fees, §4-33-122.
- Member's liability, §4-33-613.

**Partnerships.**

- Filing fees generally, §4-46-1207.
- Secretary of state.
- Documents delivered by electronic means, §4-42-708.

**Pets.**

- Retail pet stores.
- Registration fee, §4-97-104.

**Registered agents, §4-20-103.****Secured transactions.**

- Filing and indexing of records, §4-9-525.

**FEES —Cont'd****Service contracts.**

- Registration of providers, §4-114-104.

**Trademarks, §4-71-217.****Weights and measures.**

- Tests or inspections, §4-18-329.

**FICTITIOUS NAMES.****Commercial code.**

- Negotiable instruments.
- Liability of fictitious payees, §4-3-404.

**Limited liability company  
conducting business under,**  
§4-32-108.**Partnerships, conducting business  
under common, §4-42-707.****FIDUCIARIES.****Banks.**

- Foreign bank or trust company.
- Appointment authorized, §4-31-303.
- Defined, §4-31-302.
- Legislative intent, §4-31-301.

**Foreign investment companies.**

- Activities as fiduciary, §4-31-202.
- Service as fiduciary.
- Appointment authorized, §4-31-303.
- Defined, §4-31-302.
- Legislative intent, §4-31-301.

**Limited liability companies.**

- Companies engaged in practice of law acting as fiduciary, §4-32-307.
- Members, managers, etc., engaged in practice of law acting in fiduciary capacity on behalf of company, §4-32-307.

**Limited partnerships.**

- General partners, fiduciary duties, §4-47-408.

**Negotiable instruments.**

- Breach of fiduciary duty.
- Notice of, §4-3-307.

**Partnerships.**

- Partners' fiduciary duties of loyalty and due care, §4-46-404.

**Unincorporated nonprofit  
associations.**

- Duties of managers, §4-28-623.

**FINANCE LEASES.****Commercial code leases generally,**  
§§4-2A-101 to 4-2A-532.**Defined, §4-2A-103.****Irrevocable promises, §4-2A-407.****Lessee under finance lease as  
beneficiary of supply contract,**  
§4-2A-209.**Losses.**

- Casualty to identified goods, §4-2A-221.

**FINANCE LEASES —Cont'd****Losses —Cont'd**

Risk of loss, §4-2A-219.

**Supply contracts.**

Lessee under finance lease as beneficiary, §4-2A-209.

**Warranties, §§4-2A-211 to 4-2A-213.****FINANCIAL TRANSACTION CARDS.****Factoring credit cards, §§4-59-501 to 4-59-503.****Records of sale, §§4-59-501 to 4-59-503.**

Definitions, §4-59-501.

**Felonies.**

Remission to acquirer not made by remitter, §4-59-502.

Solicitation not made by merchant to remit record of sale, §4-59-503.

**FINES.****Bills of lading.**

Duplicate bills not so marked, §4-59-303.

Issuing bill when goods not received, §4-59-305.

Negotiation when goods are not in carrier's possession, §4-59-307.

Nonnegotiable bill issuance not so marked, §4-59-304.

**Cigarettes and tobacco products.**

Sales at less than cost, §4-75-708.

**Commercial transactions.**

Principal and interest statements, §4-57-103.

**Corporations.**

Foreign corporations.

Certificate of authority, transacting business without, §4-33-1502.

**Credit card solicitation on college campus, §4-104-204.****Dairy products.**

Unlawful to limit quantity, §4-75-807.

**Foreign corporations.**

Certificate of authority, transacting business without, §4-33-1502.

**Insurance.**

Foreign insurance companies.

Certificate of authority, transacting business without, §4-27-1502.

**Motion pictures.**

Unfair practices, §4-75-903.

**Odometer violations, §4-90-203.****Prize promotion, §4-102-103.****Service contracts.**

Enforcement of provisions, §4-114-111.

**Unfair trade practices, §4-75-204.****FINES —Cont'd****Warehouse receipts.**

Issuance of duplicate receipt not so marked, §4-59-403.

Issuance when goods not received or controlled, §4-59-401.

**Weights and measures.**

Civil penalties, §4-18-323.

Fruit and other merchantable commodities.

Packing, selling, pledging, etc., with fraudulent intent, §4-18-330.

**FIRE SALES.****Going out of business sales.**

General provisions, §§4-74-101 to 4-74-111.

**FIRM OFFERS.****Leases, commercial code, §4-2A-205.****Sale of goods, UCC, §4-2-205.****FITNESS CENTERS.****Health spas.**

Consumer protection, §§4-94-101 to 4-94-109.

**FITNESS FOR PARTICULAR PURPOSE.****Leases, UCC.**

Implied warranties, §4-2A-213.

**Sale of goods, UCC.**

Implied warranty, §§4-2-315, 4-2-316.

**FIXTURES.****Leases, commercial code.**

Defined, §§4-2A-103, 4-2A-309.

Lessors' and lessees' rights when goods become fixtures, §4-2A-309.

**Secured transactions.**

Filing office, §4-9-501.

Priority of security interests, §4-9-334.

Rights and duties after default.

Security agreement covering fixtures, §4-9-604.

**F.O.B.****Sale of goods, UCC, §4-2-319.**

Bill of lading required in overseas shipments, §4-2-323.

**FORCED OUT SALES.****Going out of business sales**

generally, §§4-74-101 to 4-74-111.

**FORECLOSURES.****Partnerships.**

Transferable interest of partner.

Charging order, §4-46-504.

**Secured transactions.**

Rights after default, §4-9-601.

## **FOREIGN BUSINESS TRUSTS,** §§4-31-401 to 4-31-406.

**Amendment of articles, declaration of trust or trust agreement,** §4-31-402.

**Applicability of law,** §4-31-403.

**Assumed business name, affidavit setting forth,** §4-31-402.

**Certificate showing compliance with filing requirements, issuance,** §4-31-402.

**Defined,** §4-31-401.

**Discontinuing trust business,** §4-31-404.

**Filing fees,** §4-31-406.

**Filing requirements to do business in state,** §4-31-402.

**Foreign corporations doing business in state.**

Applicability of law in effect with respect to, §4-31-403.

**Location of principal office, delivery to secretary of state,** §4-31-402.

**Merger or consolidation,** §4-31-405.

**Registered agent for service, named delivered to secretary of state,** §4-31-402.

**Requirements to do business,** §4-31-402.

**Service of process, irrevocable consent delivered to secretary of state,** §4-31-402.

**Withdrawal from or discontinue doing trust business,** §4-31-404.

## **FOREIGN CORPORATIONS.**

**Change of jurisdiction of incorporation to this state,** §4-25-109.

**Insurance companies,** §§4-27-1501 to 4-27-1532.

**Monopolies and restraint of trade.**

Automobile dealer's anti-coercion act.  
Prohibition on doing business upon violation of subchapter, §4-75-406.

**Nonprofit corporations,** §§4-28-202, 4-28-221.

**Nonprofit corporations (1993).**

Applicability of provisions to qualified foreign corporations, §4-33-1702.

Authority to transact business, §4-33-1502.

Consequences of transacting business without authority, §4-33-1502.

Certificate of existence, §4-33-128.

Certificate of withdrawal.

Form to be used, §4-33-121.

## **FOREIGN CORPORATIONS —Cont'd** **Nonprofit corporations (1993)**

—Cont'd

Certificates of authority.

Amended certificates, §4-33-1504.

Application, §4-33-1503.

Effect, §4-33-1505.

Revocation.

Appeal from, §4-33-1532.

Effect, §4-33-1531.

Grounds, §4-33-1530.

Procedure, §4-33-1531.

Form to be used, §4-33-121.

Merger with foreign corporations, §4-33-1106.

Name of corporation, §4-33-1506.

Registered agent, §4-33-1507.

Change, §4-33-1508.

Resignation, §4-33-1509.

Registered office, §4-33-1507.

Change, §4-33-1508.

Service on foreign corporation, §4-33-1510.

Transaction of business, §4-33-1502.

Withdrawal, §4-33-1520.

## **Registered agents.**

Model registered agent act, §§4-20-101 to 4-20-118.

## **FOREIGN INVESTOR COMPANIES.**

**Actions,** §4-31-204.

**Activities permitted.**

Activities as fiduciary, trustee or agent of trust, §4-31-202.

Generally, §4-31-201.

**Construction and interpretation.**

Extent of benefits and application of subchapter, §4-31-203.

**Fiduciaries.**

Activities as fiduciary, §4-31-202.

Service as fiduciary.

Appointment authorized, §4-31-303.

Legislative intent, §4-31-301.

**Parties.**

Capacity to sue and be sued, §4-31-204.

**Permitted activities.**

Activities as fiduciary, trustee or agent of trust, §4-31-202.

Generally, §4-31-201.

**Service of process,** §4-31-204.

**Taxation,** §4-31-205.

**Trusts and trustees.**

Activities as trustee or agent of trust, §4-31-202.

**Venue.**

Actions against companies, §4-31-204.

**FOREIGN LIMITED LIABILITY COMPANIES**, §§4-32-1001 to 4-32-1008.

**FOREIGN LIMITED LIABILITY PARTNERSHIPS**, §§4-46-1101 to 4-46-1105.

**FOREIGN LIMITED PARTNERSHIPS**, §§4-47-901 to 4-47-908.

**FORFEITURES.**

**Monopolies and restraint of trade.**

Automobile dealer's anti-coercion act.  
Charter rights may be forfeited for violation of provisions, §4-75-405.

**FORGERY AND COUNTERFEITING.**

**Assignments.**

Nonnegotiable instruments.  
Proof of assignment not required except on allegation of forgery, §4-58-109.

**Letters of credit**, §4-5-109.

**FORMS.**

**Cooperative associations.**

Prescription of forms by secretary of state, §4-30-115.

**Corporations.**

Documents, §4-27-121.

**Going out of business sales.**

Licenses, §4-74-109.

**Secured transactions.**

Default.  
Notification before disposition, §4-9-613.

**FORUM SELECTION CLAUSES.**

**Motor vehicle sales contracts**, §4-75-413.

**FRANCHISES.**

**Actions.**

Misleading and fraudulent schemes.  
Violation of provisions.  
Prosecutions.  
Statute of limitations, §4-72-207.

Petroleum products franchises.

Dealer-supplier or distributor franchises.

Cancellation, termination or refusal to renew, §4-72-503.

Supplier-distributor franchises.

Cancellation, termination or refusal to renew, §4-72-403.

**Advertising.**

Unlawful practices of franchisors, §4-72-206.

**FRANCHISES —Cont'd**

**Agriculture.**

Farm equipment.

Retailer franchise protection, §§4-72-301 to 4-72-311.

**Applicability of subchapter**, §4-72-203.

**Arkansas franchise practices act.**

Applicability of subchapter, §4-72-203.

Citation of chapter, §4-72-201.

Title of chapter, §4-72-201.

**Assignments.**

Definition of assignments, §4-72-202.

Notice, §4-72-205.

Requirements, §4-72-205.

**Attorney general.**

Injunctions.

Authority to seek, §4-72-208.

**Attorneys' fees.**

Remedies of franchisees, §4-72-208.

**Cancellation.**

Good cause.

Violation to cancel franchise without good cause, §4-72-204.

Notice, §4-72-204.

Petroleum products franchises.

Dealer-supplier or distributor franchises, §4-72-502.

Remedies for cancellation, §4-72-503.

Supplier-distributor franchises, §4-72-402.

Remedies, §4-72-403.

Requirements, §4-72-204.

**Construction and interpretation.**

Applicability of subchapter, §4-72-203.

Farm equipment retailer franchise protection.

Applicability of subchapter, §4-72-302.

Bulk sales law inapplicable, §4-72-303.

Cumulative nature of subchapter, §4-72-302.

Security interests unaffected by subchapter, §4-72-303.

**Death.**

Farm equipment retailer franchise protection.

Death of retailer equivalent to termination, §4-72-306.

**Definitions.**

Arkansas franchise practices act, §4-72-202.

Farm equipment retailer franchise protection, §4-72-301.

Franchise practices act, §4-72-201.

**FRANCHISES —Cont'd****Definitions —Cont'd**

- Petroleum products franchises.
  - Dealer-supplier or distributor franchises, §4-72-501.
  - Supplier-distributor franchises, §4-72-401.

**Farm equipment retailer franchise protection.**

- Applicability of subchapter, §4-72-302.
- Bulk sales.
  - Inapplicability of bulk sales law, §4-72-303.

**Cost.**

- Net cost.
  - Defined, §4-72-301.

- Cumulative nature of subchapter, §4-72-302.

**Current models.**

- Defined, §4-72-301.

**Death of retailer.**

- Equivalent to termination, §4-72-306.

**Exceptions to provisions, §4-72-307.****Inventory.**

- Defined, §4-72-301.
- Option of retailer at termination of franchise, §4-72-305.
- Repurchase by wholesaler, manufacturer or distributor, §§4-72-304, 4-72-305.
- Death of retailer, §4-72-306.
- Exceptions, §4-72-307.
- Liability for failure to repurchase, §4-72-309.
- Title and possession of inventory, §4-72-308.

**Price.**

- Current net price.
  - Defined, §4-72-301.

**Prohibited acts, §4-72-310.**

- Repurchase of inventory by wholesaler, manufacturer or distributor, §§4-72-304, 4-72-305.

**Retailers.**

- Defined, §4-72-301.

**Security interests.**

- Unaffected by subchapter, §4-72-303.

**Termination of franchise.**

- Death of retailer equivalent to termination, §4-72-306.
- Repurchase of inventory by wholesaler, manufacturer or distributor, §§4-72-304, 4-72-305.
- Retailer to have option on merchandise, §4-72-305.

**FRANCHISES —Cont'd****Farm equipment retailer franchise protection —Cont'd**

- Violations, §4-72-310.
- Warranties, §4-72-311.

**Franchisees.**

- Defined, §4-72-202.
- Remedies, §4-72-208.

**Franchise practices act.**

- Applicability of subchapter, §4-72-203.
- Citation of chapter, §4-72-201.
- Title of chapter, §4-72-201.

**Franchisers.**

- Defined, §4-72-202.
- Prohibited acts, §4-72-204.
  - Termination, cancellation or failure to renew, §4-72-204.
  - Transfer, assignment or sale of franchise, §4-72-205.
- Unlawful practices of franchisers.
  - Enumerated, §4-72-206.

**Fraud.**

- Franchisee's remedies, §4-72-207.
- Misleading and fraudulent schemes, §4-72-207.
  - Violation of provisions.
    - Penalties, §4-72-207.
- Penalties, §4-72-207.

**Good cause.**

- Cancellation.
  - Violation to cancel franchise without good cause, §4-72-204.
- Change in management of franchisee.
  - Franchisor may not seek absent good cause, §4-72-206.
- Defined, §4-72-202.

**Renewal.**

- Failure to renew.
  - Violation to fail to renew absent good cause, §4-72-204.

**Termination.**

- Right of repurchase of franchisee, §4-72-209.
- Violation to terminate or cancel franchise without good cause, §4-72-204.

**Good faith.**

- Defined, §4-72-202.
- Franchisor's dealings with franchisee, §4-72-206.

**Immunity.**

- Granting immunity to those furnishing information to and for subchapter, §4-72-210.

**Injunctions.**

- Attorney general.
  - Authority to seek, §4-72-208.
- Franchisee's remedies, §4-72-208.

**FRANCHISES —Cont'd****Injunctions —Cont'd**

- Petroleum products franchises.
  - Dealer-supplier or distributor franchises.
  - Cancellation, termination or refusal to renew, §4-72-503.
- Supplier-distributor franchises.
  - Cancellation, termination or refusal to renew, §4-72-403.

**Inventory.**

- Farm equipment retailer franchise protection.
  - Definition of inventory, §4-72-301.
  - Option of retailer on merchandise at termination of franchise, §4-72-305.
- Repurchase by wholesaler, manufacturer or distributor, §4-72-304.
  - Exceptions to provisions, §4-72-307.
  - Liability for failure to repurchase, §4-72-309.
- Title and possession of inventory, §4-72-308.

**Liability.**

- Exculpation.
  - Franchiser not to require, §4-72-206.
- Farm equipment retailer franchise protection.
  - Inventory.
    - Repurchase by wholesaler, manufacturer or distributor.
      - Failure to repurchase, §4-72-309.
- Immunity granted furnishing those information to enforce subchapter, §4-72-210.

**Limitation of actions.**

- Petroleum products franchises.
  - Dealer-supplier or distributor franchises.
    - Cancellation, termination or refusal to renew, §4-72-503.
  - Supplier-distributor franchises.
    - Cancellation, termination or refusal to renew, §4-72-403.

**Misrepresentation.**

- Misleading and fraudulent schemes.
  - Violation of provisions.
    - Penalties, §4-72-207.

**Notice.**

- Petroleum products franchises.
  - Dealer-supplier or distributor franchises.
    - Cancellation, termination or refusal to renew, §4-72-502.

**FRANCHISES —Cont'd****Notice —Cont'd**

- Petroleum products franchises
  - Cont'd
  - Supplier-distributor franchises.
    - Cancellation, termination or refusal to renew franchise, §4-72-402.
  - Termination, cancellation or failure to renew.
    - Generally, §4-72-204.
  - Transfer, assignment or sale of franchise, §4-72-205.

**Penalties.**

- Fraud, §4-72-207.

**Persons.**

- Defined, §4-72-202.

**Petroleum products franchises.**

- Dealer-supplier or distributor franchises.
  - Actions.
    - Cancellation, termination or refusal to renew franchise, §4-72-503.
  - Cancellation of franchise, §4-72-502.
    - Remedies, §4-72-503.
  - Definitions, §4-72-501.
  - "Franchises" defined, §4-72-501.
- Injunctions.
  - Cancellation, termination or refusal to renew franchise, §4-72-503.
- Limitation of actions.
  - Cancellation, termination or refusal to renew franchise, §4-72-503.
- Notice.
  - Cancellation or termination of franchise, §4-72-502.
- Petroleum products dealers.
  - Defined, §4-72-501.
- Petroleum products distributors.
  - Defined, §4-72-501.
- Petroleum products suppliers.
  - Defined, §4-72-501.
- Remedies for cancellation or termination of franchise, §4-72-503.
- Renewal.
  - Failure to renew franchise, §4-72-502.
    - Remedies, §4-72-503.
- Specific performance.
  - Cancellation, termination or refusal to renew franchise, §4-72-503.
- Termination of franchise, §4-72-502.
  - Remedies, §4-72-503.

**FRANCHISES —Cont'd****Petroleum products franchises**

## —Cont'd

Supplier-distributor franchise agreements.

## Actions.

Cancellation, termination or refusal to renew franchise, §4-72-403.

Cancellation of franchise, §4-72-402.

Remedies, §4-72-403.

Definitions, §4-72-401.

"Franchises" defined, §4-72-401.

## Injunctions.

Cancellation, termination or refusal to renew franchise, §4-72-403.

## Limitation of actions.

Cancellation, termination or refusal to renew franchise, §4-72-403.

## Notice.

Cancellation or termination of franchise, §4-72-402.

## Petroleum products distributor.

Defined, §4-72-401.

## Petroleum products supplier.

Defined, §4-72-401.

## Remedies.

Cancellation, termination, etc., of franchise, §4-72-403.

## Renewal.

Failure to renew, §4-72-402.

## Specific performance.

Cancellation, termination or refusal to renew franchise, §4-72-403.

Termination of franchise, §4-72-402.

Remedies, §4-72-403.

**Place of business.**

Defined, §4-72-202.

**Price.**

Farm equipment retailer franchise protection.

Current net price.

Defined, §4-72-301.

**Remedies.**

Franchisee's remedies, §4-72-208.

Misleading and fraudulent schemes.

Violation of provisions.

Recovery available, §4-72-208.

Petroleum products franchises.

Dealer-supplier or distributor franchises.

Cancellation, termination or refusal to renew, §4-72-503.

Supplier-distributor franchises.

Cancellation, termination or refusal to renew, §4-72-403.

**FRANCHISES —Cont'd****Renewal.**

Failure to renew.

Good faith required, §4-72-204.

Notice, §4-72-204.

Requirements, §4-72-204.

Good cause.

Failure to renew.

Violation to fail to renew absent good cause, §4-72-204.

Refusal to renew.

Petroleum products franchises.

Dealer-supplier or distributor franchises, §4-72-502.

Remedies, §4-72-503.

Supplier-distributor franchises, §4-72-402.

Remedies, §4-72-403.

**Repurchase.**

Franchisee's right of repurchase.

Termination without good cause triggering right of repurchase, §4-72-209.

**Restaurants.**

Procedural fairness.

Applicability of provisions, §4-72-603.

Commencement of civil action or arbitration proceeding, §4-72-602.

Definitions, §4-72-601.

**Sales.**

Definition of sale, §4-72-202.

Notice, §4-72-205.

Requirements, §4-72-205.

**Securities.**

Restrictions imposed by franchisor.

Unlawful practices, §4-72-206.

**Specific performance.**

Petroleum products franchises.

Dealer-supplier or distributor franchises.

Cancellation, termination or refusal to renew, §4-72-503.

Supplier-distributor franchises.

Cancellation, termination or refusal to renew, §4-72-403.

**Termination.**

Good cause.

Right of repurchase of franchisee, §4-72-209.

Violation to terminate or cancel franchise without good cause, §4-72-204.

Notice, §4-72-204.

Petroleum products franchises.

Dealer-supplier or distributor franchises, §4-72-502.

Remedies, §4-72-503.

**FRANCHISES —Cont'd****Termination —Cont'd**

Petroleum products franchises

—Cont'd

Supplier-distributor franchises,  
§4-72-402.

Remedies, §4-72-403.

Requirements, §4-72-204.

**Transfers.**

Defined, §4-72-202.

Notice, §4-72-205.

Requirements, §4-72-205.

**Treble damages.**

Franchisee's remedies, §4-72-208.

**Unlawful practices.**

Enumerated, §4-72-206.

Violation of chapter, §4-72-206.

**FRAUD.****Consumer protection.**

Deceptive trade practices, §4-88-107.

Concealment, suppression or  
omission of material facts,  
§4-88-108.

**Contracts.**

Sale of goods.

Remedies for fraud, §4-2-721.

**Conveyances.**

Fraudulent conveyances, §§4-59-201 to  
4-59-213.

**Financial transaction cards.**

Remission to acquirer of record of sale  
not made by remitter, §4-59-502.

Solicitation of merchant to remit  
record of sale not made by the  
merchant, §4-59-503.

**Franchises.**

Misleading and fraudulent schemes,  
§4-72-207.

**Going out of business sales,**

§4-74-111.

**Leases.**

Commercial code.

Effect of fraud on rights and  
remedies, §4-2A-505.

**Letters of credit, §4-5-109.****Limited liability companies.**

Notice or knowledge to member or  
manager charged to company,  
§4-32-303.

**Liquidation sales.**

Going out of business sales, §4-74-111.

**Negotiable instruments.**

Employee fraudulent endorsement.

Employer's responsibility for,  
§4-3-405.

Fictitious payees, §4-3-404.

**FRAUD —Cont'd****Negotiable instruments —Cont'd**

Forged signature or alteration of  
instrument.

Liability for negligence contributing  
to, §4-3-406.

Fraudulent endorsement.

Defined, §4-3-405.

Imposters, §4-3-405.

Unauthorized signature.

Liability, §4-3-403.

**Odometer tampering.**

Right of action, §4-90-207.

**Statute of frauds, §§4-59-101 to  
4-59-103.**

**Trademarks.**

Fraudulent registration, §4-71-211.

**Warehouse receipts.**

Issuance of receipts containing false  
statement.

Penalty, §4-59-402.

**Weights and measures.**

Fruit and other merchantable  
commodities.

Packing, selling, pledging, etc. with  
fraudulent intent, §4-18-330.

Pricing, §4-18-316.

Quantity, §4-18-315.

**FRAUDULENT TRANSFERS.****Actions.**

Extinguishment of cause of action,  
§4-59-209.

**Citation of subchapter, §4-59-212.**

**Construction and interpretation.**

Uniformity of application and  
construction, §4-59-211.

**Creditors.**

Present and future creditors.

Transfers fraudulent as to,  
§§4-59-204, 4-59-205.

Remedies, §4-59-207.

**Defenses.**

Transferee, §4-59-208.

**Definitions, §4-59-201.**

Insolvency, §4-59-202.

Value, §4-59-203.

**Insolvency.**

Defined, §4-59-202.

**Liability.**

Protection of transferee, §4-59-208.

**Limitation of actions, §4-59-209.**

**Remedies.**

Creditors, §4-59-207.

**Repeal of acts, §4-59-213.**

**Supplementary provisions, §4-59-210.**

**Title of subchapter, §4-59-212.**

**Value.**

General provisions, §4-59-203.

**FRAUDULENT TRANSFERS —Cont'd**  
**When made or obligation incurred,**  
 §4-59-206.

**FREEDOM OF INFORMATION.**  
**Charitable donor lists, court order**  
**required for disclosure,**  
 §4-28-403.

**Water authorities.**  
 Meetings and records subject to act,  
 §4-35-107.

**FUEL.**  
**Quality specifications for engine**  
**fuels, petroleum products and**  
**automotive lubricants,**  
 §§4-108-201 to 4-108-213.

**FULL FAITH AND CREDIT.**  
**Limited liability companies.**  
 Transacting business outside of state,  
 §4-32-1315.

**FUNDRAISERS.**  
**Solicitation of charitable**  
**contributions, §§4-28-401 to**  
 4-28-416.

**FUND-RAISING COUNSEL.**  
**Contracts with charitable**  
**organization, §4-28-405.**  
**Defined, §4-28-401.**  
**Registration, fees, §4-28-406.**

**FUNDS TRANSFERS, §§4-4A-101 to**  
 4-4A-507.

**Applicability of article, §4-4A-102.**  
 Exclusion of consumer transactions  
 governed by federal law,  
 §4-4A-108.

**Attachment and garnishment.**  
 Creditor process served on receiving  
 bank, §4-4A-502.

**Bank deposits and collections,**  
 §§4-4-101 to 4-4-504.

**Beneficiary.**  
 Defined, §4-4A-103.  
 Payment order misdescription,  
 §4-4A-207.

**Beneficiary's bank.**  
 Defined, §4-4A-103.  
 Payment order misdescription,  
 §4-4A-208.  
 Payment orders.  
 Obligation to pay and give notice to  
 beneficiary, §4-4A-404.  
 Payment to beneficiary, §4-4A-405.  
 Setoff by, §4-4A-502.

**Choice of law, §4-4A-507.**

**Citation of title, §4-4A-101.**

**Conflict of laws.**  
 Choice of law, §4-4A-507.

**FUNDS TRANSFERS —Cont'd**  
**Conflict of laws —Cont'd**

Exclusion of consumer transactions  
 governed by federal law,  
 §4-4A-108.

Federal reserve regulations and  
 operating circulars, §4-4A-107.

**Creditor process served on receiving**  
**bank, §4-4A-502.**

**Definitions, §4-4A-104.**  
 Authorized account, §4-4A-105.  
 Bank, §4-4A-105.

Beneficiary, §4-4A-103.

Beneficiary's bank, §4-4A-103.

Creditor process, §4-4A-502.

Customer, §4-4A-105.

Executed, §4-4A-301.

Execution date, §4-4A-301.

Funds-transfer business day,  
 §4-4A-105.

Funds-transfer system, §4-4A-105.

Index of definitions, §4-4A-105.

Intermediary bank, §4-4A-104.

Originator, §4-4A-104.

Originator's bank, §4-4A-104.

Payment date, §4-4A-401.

Payment order, §4-4A-103.

Prove, §4-4A-105.

Receiving bank, §4-4A-103.

Security procedure, §4-4A-201.

Sender, §4-4A-103.

**Federal reserve regulations and**  
**operating circulars, §4-4A-107.**

**Injunctive relief, §4-4A-503.**

**Interest.**

Rate of interest, §4-4A-506.

**Intermediary bank.**

Defined, §4-4A-104.

Payment order misdescription,  
 §4-4A-208.

**Notice.**

Payment orders.

Obligation of beneficiary's bank to  
 give notice to beneficiary,  
 §4-4A-404.

Rejection of payment order, §4-4A-210.

**Payment orders.**

Acceptance, §4-4A-209.

Amendment, §4-4A-211.

Authorized payment orders,  
 §4-4A-202.

Cancellation, §4-4A-211.

Cut-off time, §4-4A-106.

Defined, §4-4A-103.

Discharge of underlying obligation,  
 §4-4A-406.

Erroneous payment orders, §4-4A-205.

**FUNDS TRANSFERS —Cont'd****Payment orders —Cont'd**

- Execution by receiving bank.
  - Erroneous execution, §4-4A-303.
  - Duty of sender to report, §4-4A-304.
- "Executed" defined, §4-4A-301.
- "Execution date" defined, §4-4A-301.
- Failure to execute.
  - Liability for, §4-4A-305.
- Improper execution.
  - Liability for, §4-4A-305.
- Late execution.
  - Liability for, §4-4A-305.
- Obligation of receiving bank, §4-4A-302.
- Misdescription.
  - Beneficiary, §4-4A-207.
  - Beneficiary's bank, §4-4A-208.
  - Intermediary bank, §4-4A-208.
- Objection to debit of customer's account.
  - Preclusion of objection, §4-4A-505.
- Obligation of beneficiary's bank, §4-4A-404.
- Obligation of sender to pay receiving bank, §4-4A-402.
- Order in which payment orders may be charged to account, §4-4A-504.
- Order of withdrawals from account, §4-4A-504.
- Payment by beneficiary's bank to beneficiary, §4-4A-405.
- Payment by originator to beneficiary, §4-4A-406.
- Payment by sender to receiving bank, §4-4A-403.
- Payment date.
  - Defined, §4-4A-401.
- Preclusion of objection to debit of customer's account, §4-4A-505.
- Rejection, §4-4A-210.
  - Liability and duty of receiving bank regarding unaccepted payment order, §4-4A-212.
- Security procedure.
  - Defined, §4-4A-201.
- Time of acceptance, §4-4A-209.
- Time received, §4-4A-106.
- Transmission through communications system, §4-4A-206.
- Transmission through funds-transfer system, §4-4A-206.
- Unauthorized payment orders.
  - Duty of customer to report, §4-4A-204.
  - Refund of payment, §4-4A-204.

**FUNDS TRANSFERS —Cont'd****Payment orders —Cont'd**

- Verified payment orders, §4-4A-202.
- Unenforceability of, §4-4A-203.
- Scope of article**, §4-4A-102.
  - Exclusion of consumer transactions governed by federal law, §4-4A-108.
- Service of process.**
  - Creditor process on receiving bank, §4-4A-502.
- Setoff by beneficiary's bank**, §4-4A-502.
- Short title**, §4-4A-101.
- Title of article**, §4-4A-101.
- FUNGIBLE GOODS.**
- Warehousemen.**
  - Buyer in the ordinary course of business.
    - Delivery by warehouseman, §4-7-205.
    - Duty to keep goods separate, §4-7-207.

**FUTURES.****Advances.**

- Secured transactions.
  - Perfection and priority, §4-9-323.
  - Security interest in, §4-9-204.

**Secured transactions.**

- Generally, §§4-9-101 to 4-9-709.

**G****GENERAL ASSEMBLY.****Nonprofit corporations (1993).**

- Reservation of power to amend or repeal chapter, §4-33-102.

**GIFT CARDS.****Fair gift card act**, §§4-88-701 to 4-88-706.

- Definitions, §4-88-702.
- Disclosures required, §4-88-703.
- Enforcement of provisions, §4-88-705.
- Inapplicability of provisions, §4-88-704.
- Rules promulgation, §4-88-706.
- Title of provisions, §4-88-701.
- Unfair and deceptive acts and practices, §4-88-703.

**GIFTS.****Charitable contributions**, §§4-28-401 to 4-28-416.**Consumer protection.**

- Unsolicited merchandise, §4-86-103.

**Corporations.**

- Authorized, §4-25-103.

**GIFTS —Cont'd**

**Fair gift card act**, §§4-88-701 to 4-88-706.

**Nonprofit corporations (1993).**

Merger, §4-33-1107.

**Solicitation of charitable contributions**, §§4-28-401 to 4-28-416.

**GOING OUT OF BUSINESS SALES.****Advertisements.**

Licenses.

Required, §4-74-105.

**Bonds, surety.**

Licenses.

Application for license.

Application to be accompanied by bond, §4-74-107.

**Construction and interpretation.**

Sales excepted from chapter, §4-74-103.

**Continuation of business after sale.**

Seller may not continue, §4-74-110.

**Definitions**, §4-74-101.**Enforcement of chapter**, §4-74-104.**Exemptions from act**, §4-74-103.**False representations**, §4-74-111.**Fees.**

Licenses.

Application for license, §4-74-106.

**Forms.**

Licenses, §4-74-109.

**Licenses.**

Application for license, §4-74-106.

Bonds, surety, §4-74-107.

Fee, §4-74-106.

Forms, §4-74-109.

Preserving applications, §4-74-109.

Display of license, §4-74-108.

Duration, §4-74-109.

Extension, §4-74-108.

Forms, §4-74-109.

Required, §4-74-105.

Term, §4-74-108.

Extension, §4-74-108.

**Misrepresentation**, §4-74-111.**Orders.**

Sales under order of court excepted from chapter, §4-74-103.

**Penalties**, §4-74-102.**Persons.**

Defined, §4-74-101.

**Prosecuting attorneys.**

Enforcement of chapter, §4-74-104.

**Seller may not continue business after sale**, §4-74-110.

**Sheriffs.**

Enforcement of chapter, §4-74-104.

**GOING OUT OF BUSINESS SALES**

—Cont'd

**Violations of provisions.**

Misdemeanor, §4-74-102.

**GOOD FAITH.**

**Assignments of nonnegotiable instruments**, §4-58-105.

**Limited partners.**

Duties, §4-47-305.

Person erroneously believing self as limited partner, §4-47-306.

**Negotiable instruments.**

Defined, §4-3-103.

**GRAIN.****Security interest in farm products.**

Failure to disclose person with, §4-56-102.

**GRAVESTONES.****Veterans.**

Inscription, §4-86-105.

**GUARDIAN AND WARD.****Limited liability companies.**

Company engaged in practice of law acting as, §4-32-307.

Powers as to incompetent member's interest, §4-32-707.

**H****HABILITATIVE SERVICES**

**CORPORATIONS**, §§4-34-102 to 4-34-107.

**Conversion of nonprofit corporation into corporation authorized by chapter**, §4-34-105.

**Creation authorized, public body and body corporate and politic, purposes**, §4-34-102.

**Filing for incorporation**, §4-34-104.

**Nonprofit corporation act of 1993.**

Corporation authorized by chapter subject to, §4-34-106.

**Perpetual succession**, §4-34-106.

**Property taxes, obligation to pay**, §4-34-107.

**HACKING.**

**Consumer protection against computer spyware act**, §§4-111-101 to 4-111-105.

**HEALTH INSURANCE.****Secured transactions.**

Health-care-insurance receivables.

Restrictions on assignments, §§4-9-406, 4-9-408.

## **HEALTH-RELATED DISCOUNT CARDS NOT INSURANCE,**

§§4-106-201 to 4-106-205.

**Action for violation, §4-106-202.**

**Cancellation of contract and full refund.**

Buyer's right, time for exercising, §4-106-205.

**Defendant required to testify an action for violation, §4-106-202.**

**Designation of agent for service of process, §4-106-203.**

**Eye or vision care services, provisions not applicable, §4-106-204.**

**Injunctions, §4-106-202.**

**Penalty, §4-106-202.**

**Prohibited practices, §4-106-201.**

**Registration of agent for service of process, §4-106-203.**

**Statute of limitations for actions for violations, §4-106-202.**

**Venue of action for violation, §4-106-202.**

## **HEALTH SPAS.**

**Consumer protection, §§4-94-101 to 4-94-109.**

Buyers.

Defined, §4-94-102.

Citation of chapter, §4-94-101.

Construction and interpretation.

Scope of chapter, §4-94-103.

Contracts for health spa services.

Buyer financing.

Payment period.

Limitation, §4-94-107.

Cancellation, §4-94-109.

Refund of money, §4-94-109.

Defined, §4-94-102.

Delivery to buyer, §4-94-104.

Notice.

Cancellation of contract, §4-94-109.

Payment period, §4-94-107.

Time for performance, §4-94-108.

Void or voidable provisions, §4-94-105.

Planned spa facilities or spa facilities under construction.

Limitation on time of availability of services, §4-94-108.

Waiver of provisions of chapter.

Unenforceable, §4-94-105.

Writing required, §4-94-104.

Definitions, §§4-94-101, 4-94-102.

## **HEALTH SPAS —Cont'd**

**Consumer protection —Cont'd**  
Notice.

Contracts for health spa services.

Cancellation of contracts, §4-94-109.

Refunds.

Cancellation of contracts for health spa services, §4-94-109.

Registration statement, §4-94-106.

Scope of chapter, §4-94-103.

Sellers.

Defined, §4-94-102.

Title of chapter, §4-94-101.

Waiver of provisions of chapter.

Unenforceable, §4-94-105.

**Registration, §4-94-106.**

## **HEARINGS.**

**Dental corporations.**

Suspension or revocation of certificate of registration, §4-29-410.

**Medical corporations.**

Suspension or revocation of registration certificates, §4-29-310.

## **HEIRS.**

**Franchises.**

Farm equipment.

Retailer's death, §4-72-306.

Franchisor restrictions, §4-72-206.

## **HOLDERS IN DUE COURSE.**

**Bank deposits and collections.**

Collection of items by depository or collecting banks.

When bank gives value for purposes of holder in due course, §4-4-211.

**Negotiable instruments.**

Defined, §4-3-302.

Signatures and status.

Proof of, §4-3-308.

Special provisions, §4-3-302.

**Secured transactions.**

Rights, §4-9-331.

## **HOME BUYING WARRANTIES.**

**Implied warranties.**

Fitness for particular purpose, §4-2-315.

Merchantability, §4-2-314.

Usage of trade, §4-2-314.

## **HOME SECURITY SERVICES.**

**Automatic renewal of contracts, §4-86-106.**

## **HOME SOLICITATION SALES.**

**Actions.**

Civil actions against violators, §4-89-106.

**HOME SOLICITATION SALES**

—Cont'd

**Appropriate trade premises.**

Defined, §4-89-102.

**Attorney general.**

Enforcement of provisions, §4-89-106.

**Cancellation of offer or contract.**

Care of goods in possession of buyer.

Duty of buyer, §4-89-110.

Notice.

Effect, §4-89-107.

Form, §4-89-108.

Required, §4-89-108.

Return of goods, §§4-89-109, 4-89-110.

Return of payments, §4-89-109.

Right of buyer, §4-89-107.

**Contracts.**

Excepted contracts, §4-89-103.

**Damages.**

Violations of provisions, §4-89-105.

**Deceptive trade practices.**

Defined, §4-89-102.

**Definitions, §4-89-102.****Exceptions to provisions.**

Contracts, §4-89-103.

**Goods.**

Defined, §4-89-102.

**Legislative declaration.**

Purpose of act, §4-89-101.

**Mail and telephone solicitation sales.**

General provisions, §§4-95-101 to 4-95-108.

**Notice.**

Cancellation of offer or contract.

Effect, §4-89-107.

Form, §4-89-108.

Required, §4-89-108.

**Penalties.**

Violations of provisions, §4-89-104.

**Prize promotion, §§4-102-101 to 4-102-109.****Prosecuting attorneys.**

Enforcement of provisions, §4-89-106.

**Purpose of act, §4-89-101.****Sellers.**

Defined, §4-89-102.

**Services.**

Defined, §4-89-102.

**Telephone solicitation sales.**

General provisions, §§4-95-101 to 4-95-108.

**Violations of provisions.**

Damages, §4-89-105.

Penalties, §4-89-104.

**HUMANE SOCIETIES.****Retail pet stores.**

General provisions, §§4-97-101 to 4-97-109.

**I****IDENTIFICATION.****Negotiable instruments.**

Person to whom instrument payable, §4-3-110.

**IDENTIFICATION CARDS.****Personal information protection act,** §§4-110-101 to 4-110-108.**IDENTITY THEFT.****Credit report security freezes,** §§4-112-101 to 4-112-114.**Personal information protection generally,** §§4-110-101 to 4-110-108.**IMMIGRATION.****Notario or notario publico.**

Notary advertising services as.

Not authorized to assist in immigration matters.

Disclosure required, §4-109-103.

**IMMUNITY.****Consumer protection.**

Product liability, §4-86-102.

Warranties.

Breach of warranty, §4-86-101.

**Cooperative associations.**

Debts of association.

Members not liable for debts, §4-30-117.

Tort liability of cooperative, §4-30-118.

**Corporations.**

Directors, §4-26-811.

Unlawful distributions, §4-27-833.

Preincorporation transactions, §4-27-204.

Stock and stockholders.

Subscribers and shareholders, §§4-26-716, 4-27-622.

**Franchises.**

Exculpation.

Franchiser not to require, §4-72-206.

Farm equipment retailer franchise protection.

Inventory.

Repurchase by wholesaler, manufacturer or distributor.

Failure to repurchase, §4-72-309.

Granting immunity to those furnishing information to and for subchapter, §4-72-210.

Immunity granted those furnishing information to enforce subchapter, §4-72-210.

**IMMUNITY —Cont'd****Medical corporations.**

Physician-patient relationship  
unaltered, §4-29-304.

**Professional corporations.**

Limitations on professional liability.  
Persons associated with professional  
corporations, §4-29-101.  
Professional relationships unaltered by  
provisions, §4-29-205.

**IMPERSONATION.****Negotiable instruments.**

Impostors.  
Fraud, §4-3-405.  
Liability, §4-3-404.

**IMPLIED WARRANTIES.****Home buying warranties.**

Fitness for particular purpose,  
§4-2-315.  
Merchantability, §4-2-314.  
Usage of trade, §4-2-314.

**Leases, UCC.**

Fitness for particular purpose,  
§4-2A-213.  
Merchantability, §4-2A-212.  
Third-party beneficiaries, §4-2A-216.

**Sale of goods, UCC.**

Course of dealing or usage of trade,  
§4-2-314.  
Cumulation and conflict, §4-2-317.  
Exclusions, §4-2-316.  
Fitness for particular purpose,  
§§4-2-315, 4-2-316.  
Merchantability, §4-2-314.  
Modification, §4-2-316.  
Third-party beneficiaries, §4-2-318.

**INCOME TAX.****Limited liability companies.**

Tax status, §4-32-1313.

**Loans.**

Refund anticipation loans, §§4-116-101  
to 4-116-108.

**Refunds.**

Refund anticipation loans, §§4-116-101  
to 4-116-108.

**INCOMPETENCY.****Limited liability company member's interest.**

Powers of estate as to incompetent  
member's interest, §4-32-707.

**INDEMNIFICATION.****Corporations.**

Officers, directors, employees and  
agents.  
Requirements as to, §§4-26-814,  
4-27-850.

**INDEMNIFICATION —Cont'd****Limited liability company members or managers, §4-32-404.****Nonprofit corporations (1993).**

Advance for expenses, §4-33-853.  
Applicability of provisions, §4-33-858.  
Authority to indemnify, §4-33-851.  
Court-ordered indemnification,  
§4-33-854.  
Definitions, §4-33-850.  
Determination and authorization,  
§4-33-855.  
Insurance, §4-33-857.  
Mandatory indemnification, §4-33-852.  
Officers, employees and agents,  
§4-33-856.

**Partnerships.**

Indemnification of partners, §4-46-401.

**Unincorporated nonprofit associations.**

Members and managers, §4-28-627.

**INFORMATION BROKERS.****Personal information protection act,**  
§§4-110-101 to 4-110-108.**INFORMATION SYSTEMS.****Personal information protection act,**  
§§4-110-101 to 4-110-108.**Spyware.**

Consumer protection against computer  
spyware act, §§4-111-101 to  
4-111-105.

**INFRINGEMENT.****Commercial code.****Leases.**

Warranty against infringement,  
§4-2A-211.

**Sale of goods.**

Warranty against infringement of  
enjoyment of goods, §4-2-312.

**Trademarks, §4-71-212.**

Use of corporate, fictitious, or assumed  
names, §4-27-406.

**INJUNCTIONS.****Bills of lading.**

Enjoining negotiation of document,  
§4-7-602.

**Cigarettes and tobacco products.**

Unfair cigarette sales.

Violations or provisions, §4-75-713.

**Consumer protection.**

Powers of courts, §4-88-112.  
Unlawful practices, §4-88-104.

**Copyright collection practices,**  
§4-76-107.

**INJUNCTIONS —Cont'd****Corporations.**

Foreign corporations.

Certificate of authority, transacting business without, §4-33-1502.

Names.

Use of unlawful name, §§4-26-406, 4-27-405.

**Documents of title.**

Enjoining negotiation of document, §4-7-602.

**Foreign corporations.**

Certificate of authority, transacting business without, §4-33-1502.

**Franchises.**

Attorney general.

Authority to seek, §4-72-208.

Franchisee's remedies, §4-72-208.

Petroleum products franchises.

Dealer-supplier or distributor franchises.

Cancellation, termination or refusal to renew, §4-72-503.

Supplier-distributor franchises.

Cancellation, termination or refusal to renew, §4-72-403.

**Health-related discount cards not insurance, §4-106-202.****Insurance.**

Foreign insurance companies.

Certificate of authority, transacting business without, §4-27-1502.

**Limited partnerships.**

Foreign limited partnerships.

Action to restrain transacting of business, §4-47-908.

**Mail and telephone solicitation sales.**

Unlawful practices, §4-95-104.

**Milk and milk products.**

Unfair trade practices.

Violations of provisions, §4-75-809.

**Monopolies and restraint of trade.**

Actions by attorney general, §4-75-315.

Unfair practices, §4-75-212.

Violations of provisions, §4-75-211.

**Motion pictures.**

Fair practices.

Violations of provisions, §4-75-904.

**Oil and gas.**

Quality specifications for engine fuels, petroleum products and automotive lubricants, §4-108-210.

**Service contracts.**

Enforcement of provisions, §4-114-111.

**Social security numbers.**

Misappropriation, prohibited acts, §4-86-107.

**INJUNCTIONS —Cont'd****Trade secrets.**

Misappropriation, §4-75-604.

**Warehouse receipts.**

Enjoining negotiation of document, §4-7-602.

**Weights and measures, §4-18-325.****INSPECTIONS.****Contracts.**

Sale of goods.

Inspection of goods, §§4-2-512, 4-2-513.

**Cooperative associations.**

Accounts and accounting.

Right of inspection of books and records, §4-30-113.

**Weights and measures.**

Packages or amounts of commodities, §4-18-342.

**INSTALLMENT CONTRACTS.****Leases, UCC.**

Default.

Defined, §4-2A-103.

Lessee's rights and remedies, §4-2A-508.

Rejection and default, §4-2A-510.

**Sale of goods, UCC, §4-2-612.****INSURANCE.****Benevolent institutions,**

**organizations, etc., life insurance policy naming as beneficiary, §4-28-103.**

**Charities.**

Life insurance policy naming charitable institution, organization, etc., as beneficiary, §4-28-103.

**Commissioner of insurance.**

Service contracts.

Enforcement of provisions, §4-114-111.

Rules promulgation, §4-114-112.

**Leases.**

Commercial code.

Leased goods, §4-2A-218.

**Nonprofit corporations.**

Indemnification of director, etc., §4-33-857.

Key-man life insurance.

Use of public funds to purchase prohibited, §4-28-103.

Life insurance naming religious, educational, etc., institution, organization, etc., as beneficiary, §4-28-103.

**INSURANCE —Cont'd**  
**Religion.**

Life insurance policy naming religious institution, organization, etc., as beneficiary, §4-28-103.

**Service contracts.**

Enforcement of provisions, §4-114-111.

Provider insurance requirements, §4-114-104.

Reimbursement insurance policies.

Cancellation, §4-114-109.

Disclosures, §4-114-105.

Obligations of insurers, §4-114-110.

Rules promulgation, §4-114-112.

**Unincorporated nonprofit associations.**

Liability insurance for members or managers, §4-28-627.

**INSURANCE COMPANIES.****Foreign insurance companies.**

Applicability of chapter.

Qualified foreign corporations, §4-27-1702.

Automobile dealer's anti-coercion act.

Prohibition on doing business upon violation of subchapter, §4-75-406.

Certificate of authority.

Amendments, §4-27-1504.

Application.

Contents, §4-27-1503.

Consequences of transacting business without, §4-27-1502.

Effect, §4-27-1505.

Penalties.

Transacting business without authority, §4-27-1502.

Required, §4-27-1501.

Revocation.

Appeal, §4-27-1532.

Effect, §4-27-1531.

Grounds, §4-27-1530.

Procedure, §4-27-1531.

Certificate of withdrawal, §4-27-1520.

Name, §§4-26-401, 4-27-1506.

Transaction of business.

Activities excluded, §4-27-1501.

Withdrawal, §4-27-1520.

**INTEREST.****Actions, §4-57-108.**

Usurious contracts.

Attorneys at law.

Fees in litigation involving usurious transactions, §4-57-108.

**INTEREST —Cont'd**  
**Attorneys at law.**

Fees.

Litigation involving usurious transaction, §4-57-108.

**Calculating interest.**

Annual computation when computation period not stated, §4-57-101.

Month, §4-57-101.

Part of month, §4-57-101.

Partial payment, §4-57-101.

**Carriers.**

Freight and parcel delivery services.

Interest on deposits, §4-86-104.

**Contracts.**

Maximum rate of interest by contract, §4-57-104.

**Discounting.**

Period, §4-57-102.

**Limited partnerships.**

Interest rates, §4-47-107.

**Negotiable instruments, §4-3-112.****Partial payment.**

Calculating interest, §4-57-101.

**Partnerships.**

Rate if not specified in obligation, §4-46-104.

**Penalties.**

Statement of principal and interest.

Refusal to furnish or furnishing false statement, §4-57-103.

**Prejudgment interest, §4-57-104.****Railroads.**

Freight and parcel delivery services.

Interest on deposits, §4-86-104.

**Rates of interest.**

Freight and parcel delivery services, §4-86-104.

Maximum rates, §4-57-104.

Exceeding maximum rates prohibited, §4-57-105.

Usury.

Prohibited, §4-57-105.

**Reserved or discounted for thirty-six months.**

Authorized, §4-57-102.

**Statement of principal and interest.**

Lender required to furnish to debtor, §4-57-103.

Refusal to furnish or furnishing false statement.

Penalties, §4-57-103.

**Usury.**

Prohibited, §4-57-105.

**INTERNET.****Connect Arkansas broadband**

program, §§4-113-101 to 4-113-106.

**INTERNET —Cont'd**

**Consumer protection against computer spyware act,**  
§§4-111-101 to 4-111-105.

**Ticket sales, restrictions,** §4-70-103.

**Unsolicited commercial and sexually explicit electronic mail prevention act,** §§4-88-601 to 4-88-607.

Authority of providers, §4-88-604.

Blocking receipt.

Authority of providers, §4-88-604.

Civil actions, §4-88-606.

Criminal penalty, §4-88-605.

Definitions, §4-88-602.

Enforcement of provisions, §4-88-607.

Notice by recipient not to send future communications, §4-88-603.

Preexisting business or personal relationship with recipient.

Commercial mail not unsolicited,  
§4-88-603.

Requirements for sending, §4-88-603.

Short title, §4-88-601.

**INTERPLEADER AND  
INTERVENTION.**

**Limited partnerships.**

General partners.

Actions for improper distributions,  
impleading of others, §4-47-509.

**Nonprofit corporations.**

Judicial intervention into affairs of corporations, §4-33-160.

**INTERSTATE COMMERCE.**

**Limited liability companies.**

Foreign limited liability companies.

Transactions not constituting  
transacting business,  
§4-32-1008.

**INVENTORY.**

**Franchises.**

Farm equipment retailer franchise protection.

Definition of inventory, §4-72-301.

Option of retailer on merchandise at termination of franchise,  
§4-72-305.

Repurchase by wholesaler,  
manufacturer or distributor,  
§4-72-304.

Exceptions to provisions,  
§4-72-307.

Liability for failure to repurchase,  
§4-72-309.

Title and possession of inventory,  
§4-72-308.

**INVENTORY —Cont'd**

**Secured transactions.**

Purchase-money security interest,  
§4-9-103.

**INVESTIGATIONS.**

**Consumer protection.**

Deceptive trade practices, §4-88-111.

Failure to cooperate in  
investigations, §4-88-112.

Powers and duties of consumer  
protection division, §4-88-105.

**Motor vehicles.**

Service contracts, §4-90-509.

**Weights and measures.**

Bureau of standards.

Director, §4-18-340.

**INVESTMENTS.**

**Companies.**

Stock and stockholders.

Annual meeting, §4-27-701.

Authorized shares, §4-27-601.

Distributions to shareholders,  
§4-27-640.

**Stock and stockholders.**

Companies.

Annual meeting, §4-27-701.

Authorized shares, §4-27-601.

Distributions to shareholders,  
§4-27-640.

**INVESTMENT SECURITIES,**

§§4-8-101 to 4-8-603.

**Account,** §4-8-501.

**Acquisition of security or financial  
asset or interest therein,**  
§4-8-104.

**Adverse claimant, liability to,**  
§4-8-115.

**Adverse claims.**

Assertion against entitlement holder,  
§4-8-502.

Notice of, §4-8-105.

**Alteration,** §4-8-206.

**Authenticating trustee duties,**  
§4-8-407.

**Citation of article.**

Short title, §4-8-101.

**Classifying assets,** §4-8-103.

**Clearing corporation rules,** §4-8-111.

**Completion,** §4-8-206.

**Conflict of laws,** §4-8-110.

**Control classifications delineated,**  
§4-8-106.

**Creditor's legal process,** §4-8-112.

**Defenses.**

Issuer's defenses.

Generally, §4-8-202.

**INVESTMENT SECURITIES —Cont'd****Defenses —Cont'd**

Issuer's defenses —Cont'd

Notice of defense, §§4-8-202, 4-8-203.

**Definitions, §4-8-102.**

Appropriate evidence of appointment or incumbency, §4-8-402.

General commercial code definitions, §4-1-201.

Guarantee of the signature, §4-8-402.

Issuers, §4-8-201.

Overissue, §4-8-210.

Protected purchasers, §4-8-303.

Securities account, §4-8-501.

**Delivery, §4-8-301.****Destroyed security notification, §4-8-406.****Destroyed security replacement, §4-8-405.****Endorsements, §4-8-304.**

Effectiveness, §4-8-107.

Effect of guaranteeing, §4-8-306.

Registration of securities.

Assurance that endorsements are effective, §4-8-402.

Duty of issuer to register transfer, §4-8-401.

**Entitlement order.**

Effectiveness, §4-8-107.

**Evidence, §4-8-114.****Instructions, §4-8-305.**

Assurance that instructions are effective, §4-8-402.

Effectiveness, §4-8-107.

Effect of guaranteeing, §4-8-306.

**Intermediaries.**

Duties as to payments and distributions, §4-8-505.

Duties to change entitlement holder's position to other form of security holding, §4-8-508.

Duties to comply with entitlement order, §4-8-507.

Duties to exercise rights as directed by entitlement holder, §4-8-506.

Duties to maintain financial assets, §4-8-504.

Duties to specified by other statute or regulations, §4-8-509.

Entitlement holder exercising rights, §4-8-509.

Manner of performance of duties, §4-8-509.

Property interest of entitlement holder in financial assets held by, §4-8-503.

**Issuers.**

Defenses.

Generally, §4-8-202.

**INVESTMENT SECURITIES —Cont'd****Issuers —Cont'd**

Defenses —Cont'd

Notice of defense, §§4-8-202, 4-8-203.

Defined, §4-8-201.

Demands upon not to register transfer, §4-8-403.

Liens, §4-8-209.

Notice to of lost, destroyed, or wrongfully taken security certificate, §4-8-406.

Registration.

Transfer of security.

Duty of issuer, §4-8-401.

Responsibility, §4-8-202.

Transfer restrictions.

Effect, §4-8-204.

**Issues.**

Overissue, §4-8-210.

Unauthorized signature on issue.

Effect, §4-8-205.

**Liens.**

Issuer's lien, §4-8-209.

**Lost security notification, §4-8-406.****Lost security replacement, §4-8-405.****Notice.**

Adverse claims, §4-8-105.

Defects or defenses, §§4-8-202, 4-8-203.

Issuer to receive notice of lost, destroyed, or wrongfully taken security certificate, §4-8-406.

**Overissue, §4-8-210.**

Unauthorized signature on issue.

Effect, §4-8-205.

**Priority among security interests and entitlement holders, §4-8-511.****Property interest of entitlement holder in financial assets held by securities intermediary, §4-8-503.****Purchasers.**

Protected purchasers, §4-8-303.

Rights, §4-8-302.

Rights acquired from entitlement holder, §4-8-510.

Right to requisites for registration of transfer, §4-8-307.

Securities intermediary as purchaser for value, §4-8-116.

**Registration.**

Duties of registrar, §4-8-407.

Issuers.

Duty of issuer, §4-8-401.

Signature of registrar.

Effect, §4-8-208.

Transfer.

Demands upon issuer not to register, §4-8-403.

**INVESTMENT SECURITIES —Cont'd****Registration —Cont'd****Transfer —Cont'd**

Duty of issuer to register transfer,  
§4-8-401.

Wrongful registration, §4-8-404.

**Rules for determining whether certain obligations and interests are securities or financial interests, §4-8-103.**

**Savings clause, §4-8-603.**

**Secured transactions.**

Generally, §§4-9-101 to 4-9-709.

**Signatures.**

Authenticating trustee's, registrar's or transfer agent's signature.

Effect, §4-8-208.

Effect of guaranteeing, §4-8-306.

**Issues.**

Unauthorized signatures.

Effect, §4-8-205.

**Statute of frauds.**

Applicability, §4-8-113.

**Title of article.**

Short title, §4-8-101.

**Transfer.**

Agent's duties, §4-8-407.

Agent's signature.

Effect, §4-8-208.

Demands upon issuer not to register,  
§4-8-403.

Issuer's restrictions.

Effect, §4-8-204.

**Registration.**

Duty of issuer to register transfer,  
§4-8-401.

**Trusts and trustees.**

Authenticating trustee.

Signature.

Effect, §4-8-208.

**Warranties.**

Direct holding, §4-8-108.

Effect of signature of authenticating trustee, registrar or transfer agent, §4-8-208.

Indirect holding, §4-8-109.

**Wrongfully taken security notification, §4-8-406.****Wrongfully taken security replacement, §4-8-405.****J****JEWELERS.**

**Sale of fracture-filled and clarity-enhanced diamonds, §4-101-201.**

**JOINDER OF ACTIONS.****Monopolies and restraint of trade.**

Discrimination.

Price of manufactured products, coal oil or dressed beef.

Actions for recovery of forfeitures.

Joinder of offenses, §4-75-501.

**JOINT AND SEVERAL LIABILITY.**

**Negotiable instruments, §4-3-116.**

**JOINT TENANTS AND TENANTS IN COMMON.****Stock and stockholders.**

Ownership as joint tenants and not tenants in common.

Authority to hold certificates in joint tenancy, §4-25-105.

**JUDGMENT CREDITORS.****Limited liability companies.**

Rights of judgment creditors,  
§4-32-705.

**JUDGMENTS AND DECREES.****Limited partnerships.**

General partners, execution of judgments against, §4-47-405.

**Nonprofit corporations.**

Judicial dissolution, §4-33-1433.

**Partnerships.**

Against partnerships, §4-46-307.

Transferable interest of partner.

Charging order, subject to,  
§4-46-504.

**Unincorporated nonprofit associations.**

Judgment or order against association,  
§4-28-610.

**JUNK E-MAIL, §§4-88-601 to 4-88-607.**

**JURISDICTION.****Consumer credit.**

Equal consumer credit act.

Actions for violations, §4-87-102.

**Corporations.**

Liquidation.

Jurisdiction of court to liquidate assets and business of corporation, §4-26-1108.

Jurisdiction of court to supervise liquidation, §4-26-1106.

**Limited partnerships.**

Conversion and merger.

Foreign organization that is converted.

Consent to jurisdiction,  
§4-47-1105.

Foreign organization that is survivor of merger.

Consent to jurisdiction,  
§4-47-1109.

**JURISDICTION —Cont'd****Registered agents.**

Jurisdiction over represented entity  
not established, §4-20-115.

**Sales representatives.**

Jurisdiction over principal, §4-70-304.

**Weights and measures.**

Local officials, §4-18-314.

**K****KITTY LEMON LAW, §4-97-105.****L****LABELS.****Charitable solicitation containers,**

§§4-103-201 to 4-103-205.

**LADING, BILLS OF.****Documents of title generally,**

§§4-7-101 to 4-7-704.

**LANDLORD AND TENANT.****Statute of frauds.**

Leases, estates, etc., §4-59-102.

**LAW ENFORCEMENT AGENCIES.****Tobacco control board, §4-75-714.****LEASES.****Assignments.**

Commercial code, §4-2A-303.

**Attorneys at law.**

Commercial code.

**Fees.**

Unconscionable lease contracts or  
clauses, §4-2A-108.

**Bankruptcy and insolvency.**

Commercial code.

Lessee's rights to goods on lessor's  
insolvency, §4-2A-522.

**Burden of proof.**

Commercial code.

Default of lessor.

Burden of establishing default  
after acceptance of goods,  
§4-2A-516.

**Commercial code, §§4-2A-101 to  
4-2A-532.**

**Conflict of laws.**

Commercial code.

Applicability of chapter.

Lease subject to other statutes,  
§4-2A-104.

Consumer leases.

Limitation on power of parties to  
choose applicable law and  
judicial forum, §4-2A-106.

**LEASES —Cont'd****Defenses.**

Commercial code.

Unconscionability, §4-2A-108.

**Definitions.**

Commercial code, §4-2A-103.

Accessions, §4-2A-310.

Fixtures, §§4-2A-103, 4-2A-309.

Index of definitions, §4-2A-103.

**Evidence.**

Commercial code.

Extrinsic evidence, §4-2A-202.

**Fraud and deceit.**

Commercial code.

Effect of fraud on rights and  
remedies, §4-2A-505.

**Insurance.**

Commercial code.

Leased goods, §4-2A-218.

**Limitation of actions.**

Commercial code.

Actions for default, §4-2A-506.

**Motor vehicles.**

Prohibited transfers, §4-100-103.

Definitions, §4-100-101.

Penalties, §4-100-102.

Remedies, §4-100-102.

**Parol evidence.**

Commercial code, §4-2A-202.

**Replevin.**

Commercial code.

Default by lessor.

Right of lessee to replevy goods,  
§§4-2A-508, 4-2A-521.

**Sales.**

Commercial code.

Sale of goods by lessee, §4-2A-305.

**Seals and sealed instruments.**

Commercial code.

Inoperative to render lease a sealed  
instrument, §4-2A-203.

**Secured transactions.**

Commercial code lease provisions.

Priority of security interest in goods,  
§4-2A-307.

**Specific performance.**

Commercial code.

Default by lessor.

Right of lessee to obtain specific  
performance, §§4-2A-508,  
4-2A-521.

**Statute of frauds.**

Assignment.

Compliance of statute required,  
§4-59-102.

Commercial code, §4-2A-201.

Violation of statute.

Effect, §4-59-102.

**LEASES —Cont'd****Statute of frauds —Cont'd**

Writing required, §4-59-101.

**Statute of limitations.**

Commercial code.

Actions for default, §4-2A-506.

**LEASES, UCC, §§4-2A-101 to 4-2A-532.****Acceptance of goods, §4-2A-515.**

Accessions.

Lessor's and lessee's rights when goods become accessions, §4-2A-310.

Burden of establishing default after acceptance, §4-2A-516.

Damages.

Lessor's damages for nonacceptance, §4-2A-528.

Effect, §4-2A-516.

Lessor's and lessee's rights.

When goods become accessions, §4-2A-310.

Nonconforming goods or delivery of goods, §4-2A-509.

Notice of default, §4-2A-516.

Revocation of acceptance, §4-2A-517.

Damages, §4-2A-519.

Justifiable revocation, §4-2A-517.

Lessee's rights and remedies, §4-2A-508.

Wrongful revocation, §4-2A-523.

**Accessions.**

Defined, §§4-2A-103, 4-2A-310.

**Alienability of interest.**

Lessor's residual interest in goods, §4-2A-103.

Party's interest under lease contract, §4-2A-103.

**Animals.**

Unborn young.

Definition of "goods," §4-2A-103.

Identification, §4-2A-217.

**Anticipatory repudiation, §4-2A-402.**

Retraction, §4-2A-403.

**Applicability of article.**

Certificates of title.

Territorial application of article to goods covered by certificates, §4-2A-105.

Leases subject to other statutes, §4-2A-104.

**Assignments, §4-2A-103.****Attorneys at law.**

Fees.

Unconscionable lease contracts or clauses, §4-2A-108.

**Bankruptcy and insolvency.**

Lessee's rights to goods on lessor's insolvency, §4-2A-522.

**LEASES, UCC —Cont'd****Cancellation.**

Defined, §4-2A-103.

Effect on rights and remedies, §4-2A-505.

Lessor's remedies, §4-2A-523.

**Casualty to identified goods,**

§4-2A-221.

**Citation of article, §4-2A-101.****Claims.**

Limitation of actions, §4-2A-506.

Notice of claim to person answerable over, §4-2A-516.

Rent.

Action by lessor, §4-2A-529.

Third parties.

Standing to sue for injury to goods, §4-2A-531.

Waiver or renunciation, §4-2A-107.

**Conflict of laws.**

Leases subject to other statutes, §4-2A-104.

Limitation on power of parties to choose applicable law and judicial forum, §4-2A-106.

**Consumer leases.**

Choice of judicial forum, §4-2A-106.

Defined, §4-2A-103.

Option to accelerate at will, §4-2A-109.

Unconscionability, §4-2A-108.

**Cover by lessor, §4-2A-518.****Creditors' special rights, §4-2A-308.****Damages.**

Acceptance of goods.

Nonacceptance.

Lessor's damages, §4-2A-528.

Consequential damages, §4-2A-520.

Cover by lessor.

Effect, §4-2A-518.

Incidental damages, §4-2A-520.

Lessor's damages, §4-2A-530.

Lessee's incidental and consequential damages.

Generally, §4-2A-520.

Lessor's damages.

Generally, §4-2A-523.

Incidental damages, §4-2A-530.

Nonacceptance or repudiation by lessee, §4-2A-528.

Liquidation, §4-2A-504.

Nondelivery of goods, §4-2A-519.

Rejection of goods, §4-2A-519.

Repudiation by lessee.

Lessor's damages, §4-2A-528.

Repudiation by lessor, §4-2A-519.

Revocation of acceptance of goods, §4-2A-519.

**LEASES, UCC —Cont'd****Damages —Cont'd****Warranties.**

Breach of warranty, §§4-2A-508,  
4-2A-519.

**Default.**

Anticipatory repudiation, §§4-2A-402,  
4-2A-403.

**Cover.**

Right of lessor, §4-2A-518.

**Installment lease contracts.**

Lessee's rights and remedies,  
§4-2A-508.

Rejection and default, §4-2A-510.

**Limitation of actions, §4-2A-506.**

Modification or impairment,  
§4-2A-503.

Notice, §§4-2A-502, 4-2A-516.

Procedure generally, §4-2A-501.

Replevin of goods, §§4-2A-508,  
4-2A-521.

**Rights and remedies.****Default by lessee.**

Disposal of goods by lessor,  
§§4-2A-523, 4-2A-524,  
4-2A-527.

Identification of goods to lease  
contract, §4-2A-524.

Possession of goods, §§4-2A-523,  
4-2A-525.

Rent action by lessor, §4-2A-529.

**Default by lessor.****Cover, §4-2A-518.**

Lessee's rights and remedies  
generally, §4-2A-508.

Nonconforming goods or delivery  
of goods, §§4-2A-509,  
4-2A-510.

Replevy of goods, §§4-2A-508,  
4-2A-521.

Specific performance, §§4-2A-508,  
4-2A-521.

Substitute goods, §4-2A-518.

Waiver or renunciation of rights  
after default, §4-2A-107.

**Risk of loss.**

Effect of default on risk, §4-2A-220.

**Defenses.**

Unconscionability, §4-2A-108.

**Definitions, §4-2A-103.**

Accessions, §4-2A-310.

Fixtures, §§4-2A-103, 4-2A-309.

Index of definitions, §4-2A-103.

**Delegation of performance,  
§4-2A-103.****Disposal of goods.**

Lessor's rights and remedies,  
§§4-2A-523, 4-2A-524, 4-2A-527.

**LEASES, UCC —Cont'd****Enforcement of lease contract,  
§4-2A-301.****Evidence.**

Extrinsic evidence, §4-2A-202.

**Excused performance, §4-2A-405.****Express warranties.**

Generally, §4-2A-210.

Third-party beneficiaries, §4-2A-216.

**Extrinsic evidence, §4-2A-202.****Finance leases.**

Defined, §4-2A-103.

Irrevocable promises, §4-2A-407.

Lessee under finance lease as  
beneficiary of supply contract,  
§4-2A-209.

**Losses.**

Casualty to identified goods,  
§4-2A-221.

Risk of loss, §4-2A-219.

**Supply contracts.**

Lessee under finance lease as  
beneficiary, §4-2A-209.

**Warranties.**

Implied warranty of fitness for  
particular purpose, §4-2A-213.

Implied warranty of  
merchantability, §4-2A-212.

Warranty against infringement,  
§4-2A-211.

**Firm offers, §4-2A-205.****Fitness for particular purpose.**

Implied warranties, §4-2A-213.

**Fixtures.**

Defined, §§4-2A-103, 4-2A-309.

Lessor's and lessee's rights.

When goods become fixtures,  
§4-2A-309.

**Formation.**

Firm offers, §4-2A-205.

Generally, §4-2A-204.

Offer and acceptance.

Firm offers, §4-2A-205.

Generally, §4-2A-206.

**Fraud.**

Effect on rights and remedies,  
§4-2A-505.

**Identification of goods, §4-2A-217.**

Casualty to identified goods,  
§4-2A-221.

Insurable interest in existing goods.

Vesting in lessee, §4-2A-218.

Lessor's right to identify goods upon  
lessee's default, §4-2A-524.

**Implied warranties.**

Fitness for particular purpose,  
§4-2A-213.

Merchantability, §4-2A-212.

**LEASES, UCC —Cont'd****Implied warranties —Cont'd**

Third-party beneficiaries, §4-2A-216.

**Infringement.**

Warranty against, §4-2A-211.

**Insecurity.**

Adequate assurance of performance, §4-2A-401.

**Insolvency of lessor.**

Lessee's rights to goods, §4-2A-522.

**Installment lease contracts.**

Default.

Lessee's rights and remedies, §4-2A-508.

Rejection and default, §4-2A-510.

Defined, §4-2A-103.

**Insurance, §4-2A-218.****Interference with goods.**

Warranty against interference, §4-2A-211.

**Liens.**

Defined, §4-2A-103.

Priority of certain liens arising by operation of law, §4-2A-306.

Priority of liens arising by attachment or levy on, security interest in and other claims to goods, §4-2A-307.

**Limitation of actions.**

Action for default, §4-2A-506.

**Losses.**

Casualty to identified goods, §4-2A-221.

Risk of loss, §4-2A-219.

Effect of default, §4-2A-220.

**Market rent.**

Proof, §4-2A-507.

**Merchantability.**

Implied warranties, §4-2A-212.

**Merchant leases.**

Defined, §4-2A-103.

**Merchant lessees.**

Rightfully rejected goods.

Duties, §4-2A-511.

**Modification, §4-2A-208.****Motor vehicles.**

Terminal rental adjustment clauses, §4-2A-110.

**Notice.**

Default, §§4-2A-502, 4-2A-516.

**Objections to goods.**

Waiver of lessee's objections, §4-2A-514.

**Offer and acceptance.**

Firm offers, §4-2A-205.

Generally, §4-2A-206.

**Parol evidence, §4-2A-202.****Payment or performance.**

Delegation of performance, §4-2A-103.

**LEASES, UCC —Cont'd****Payment or performance —Cont'd**

Excused performance, §4-2A-405.

Procedure on excused performance, §4-2A-406.

**Insecurity.**

Adequate assurance of performance, §4-2A-401.

Option to accelerate at will, §4-2A-109.

Substituted performance, §4-2A-404.

**Possession of goods, §4-2A-302.**

Lessor's rights and remedies, §§4-2A-523, 4-2A-525.

**Priorities.**

Liens.

Certain liens arising by operation of law, §4-2A-306.

Liens arising by attachment or levy on, security interest in and other claims to goods, §4-2A-307.

Subordination of priority, §4-2A-311.

**Promises.**

Irrevocable promises, §4-2A-407.

**Rent.**

Action by lessor for rent, §4-2A-529.

Proof of market rent, §4-2A-507.

**Replevy of goods, §§4-2A-508, 4-2A-521.****Repudiation.**

Anticipatory repudiation, §4-2A-402.

Retraction, §4-2A-403.

Damages.

Lessee's damages, §4-2A-519.

Lessor's damages, §4-2A-528.

Insecurity.

Failure to provide adequate assurance of performance, §4-2A-401.

Lessee's rights and remedies.

Damages for repudiation, §4-2A-519.

Lessor's remedies, §4-2A-523.

**Rescission, §4-2A-208.**

Effect on rights and remedies, §4-2A-505.

**Rights and remedies.**

Cancellation, termination, rescission or fraud.

Effect on rights and remedies, §4-2A-505.

Default by lessee.

Disposal of goods by lessor, §§4-2A-523, 4-2A-524, 4-2A-527.

Identification of goods to lease contract, §4-2A-524.

Lessor's remedies generally, §4-2A-523.

**LEASES, UCC —Cont'd****Rights and remedies —Cont'd**

## Default by lessee —Cont'd

Possession of goods, §§4-2A-523,  
4-2A-525.

## Rent.

Action by lessor, §4-2A-529.

Stoppage of delivery of goods,  
§§4-2A-523, 4-2A-526.

## Default by lessor.

Lessee's rights and remedies  
generally, §4-2A-508.

Nonconforming goods or delivery of  
goods, §§4-2A-509, 4-2A-510.

Replevin of goods, §4-2A-508.

Specific performance, §4-2A-508.

## Installment lease contracts.

Lessee's rights and remedies,  
§4-2A-508.

Modification or impairment,  
§4-2A-503.

Residual interest, lessor's right to,  
§4-2A-532.

**Risk of loss, §4-2A-219.**

Effect of default, §4-2A-220.

**Sales.**

Sale of goods by lessee, §4-2A-305.

**Scope of provisions, §4-2A-102.****Seals.**

Inoperative to render lease a sealed  
instrument, §4-2A-203.

**Secured transactions.**

Priority of security interest in goods,  
§4-2A-307.

Restrictions on security interest in  
leasehold, §4-9-407.

Security interests, §4-9-110.

Lease distinguished from, §4-1-203.

**Shipment and delivery.**

Acceptance of goods, §4-2A-515.

## Accessions.

Lessor's and lessee's rights when  
goods become accessions,  
§4-2A-310.

Burden of establishing default after  
acceptance, §4-2A-516.

## Damages.

Lessor's damages for  
nonacceptance, §4-2A-528.

Effect, §4-2A-516.

Nonconforming goods or delivery,  
§4-2A-509.

Notice of default, §4-2A-516.

Revocation of acceptance, §4-2A-517.

Damages, §4-2A-519.

Justifiable revocation, §4-2A-517.

Lessee's rights and remedies,  
§4-2A-508.

**LEASES, UCC —Cont'd****Shipment and delivery —Cont'd**

## Acceptance of goods —Cont'd

Revocation of acceptance —Cont'd  
Wrongful revocation, §4-2A-523.

Casualty to identified goods,  
§4-2A-221.

## Failure to deliver goods.

Lessee's rights and remedies,  
§4-2A-508.

Identification of goods, §4-2A-217.

## Improper tender or delivery.

Burden of establishing default after  
acceptance of goods, §4-2A-516.

Cure by lessor, §4-2A-513.

## Lessee's rights.

Installment lease contracts,  
§4-2A-510.

Notice of default after acceptance of  
goods, §4-2A-516.

## Objection by lessee.

Waiver, §4-2A-514.

## Notice of default.

Accepted goods, §4-2A-516.

## Rejection of goods.

## Accepted goods.

Rejection precluded, §4-2A-516.

Cure by lessor, §4-2A-513.

Damages, §4-2A-519.

Installment lease contracts,  
§4-2A-510.

## Replacement of rejected goods.

Cure by lessor, §4-2A-513.

Rightfully rejected goods, §4-2A-509.

Lessee's duties generally,  
§4-2A-512.

Lessee's rights and remedies,  
§4-2A-508.

Merchant lessee's duties,  
§4-2A-511.

## Wrongfully rejected goods.

Lessor's remedies, §4-2A-523.

Revocation of acceptance of goods,  
§4-2A-517.

Damages, §4-2A-519.

Justifiable revocation, §4-2A-517.

Lessee's rights and remedies,  
§4-2A-508.

Wrongful revocation, §4-2A-523.

## Stoppage of delivery.

Failure of agreed means or manner  
of payment, §4-2A-404.

Lessor's remedies, §§4-2A-523,  
4-2A-526.

Subsequent lease of goods by lessor,  
§4-2A-304.

## Withholding delivery.

Failure of agreed means or manner  
of payment, §4-2A-404.

**LEASES, UCC** —Cont'd  
**Special rights of creditors**, §4-2A-308.  
**Specific performance**, §§4-2A-208, 4-2A-521.  
**Statute of frauds**, §4-2A-201.  
**Statute of limitations**.  
    Actions for default, §4-2A-506.  
**Sublease by lessee**, §4-2A-305.  
**Subordination of priority**, §4-2A-311.  
**Subsequent lease of goods by lessor**, §4-2A-304.  
**Substituted performance**, §4-2A-404.  
**Substitute goods**, §4-2A-518.  
    Cover by lessor, §4-2A-518.  
**Supply contracts**.  
    Beneficiaries.  
        Lessee under finance lease, §4-2A-209.  
    Defined, §4-2A-103.  
**Termination**.  
    Effect on rights and remedies, §4-2A-505.  
**Third parties**.  
    Standing to sue for injury to goods, §4-2A-531.  
    Warranties.  
        Third-party beneficiaries, §4-2A-216.  
**Title of article**.  
    Short title, §4-2A-101.  
**Title to goods**, §4-2A-302.  
    Infringement.  
        Warranty against, §4-2A-211.  
**Unconscionability**, §4-2A-108.  
**Waiver**.  
    Claims, rights after default or breach of warranty, §4-2A-107.  
    Generally, §4-2A-208.  
    Objections by lessee to goods, §4-2A-514.  
**Warranties**.  
    Breach of warranty.  
        Damages, §§4-2A-508, 4-2A-519.  
        Notice of claim or litigation answerable over, §4-2A-516.  
        Waiver or renunciation of rights after breach, §4-2A-107.  
    Cumulation and conflict, §4-2A-215.  
    Damages.  
        Breach of warranty, §§4-2A-508, 4-2A-519.  
    Exclusion, §4-2A-214.  
    Express warranties.  
        Generally, §4-2A-210.  
        Third-party beneficiaries, §4-2A-216.  
    Implied warranties.  
        Fitness for particular purpose, §4-2A-213.  
        Merchantability, §4-2A-212.

**LEASES, UCC** —Cont'd  
**Warranties** —Cont'd  
    Implied warranties —Cont'd  
        Third-party beneficiaries, §4-2A-216.  
    Infringement.  
        Warranty against, §4-2A-211.  
    Interference with goods.  
        Warranty against, §4-2A-211.  
    Modification, §4-2A-214.  
    Third-party beneficiaries, §4-2A-216.  
**LEMON LAW**, §§4-90-401 to 4-90-417.  
**Actions**.  
    Consumer's right to bring civil action to enforce provisions, §4-90-415.  
**Arbitration**.  
    Informal dispute resolution, §4-90-414.  
**Assistive devices**, §§4-105-201 to 4-105-206.  
**Assistive device warranty**, §§4-105-201 to 4-105-206.  
**Attorneys' fees**.  
    Enforcement of provisions, §4-90-415.  
**Citation of subchapter**, §4-90-401.  
**Claims**.  
    Noticed by consumer, §4-90-404.  
**Costs**, §4-90-415.  
**Deceptive trade practices**.  
    Violations of provisions, §4-90-417.  
**Defenses**.  
    Affirmative defenses, §4-90-413.  
**Definitions**, §4-90-403.  
**Diagnosis**.  
    Refusal to make, §4-90-411.  
**Disclosure by manufacturer, agent or dealer**, §4-90-404.  
**Enforcement of provisions**, §4-90-415.  
**Informal dispute resolution**, §4-90-414.  
**Intent of legislature**, §4-90-402.  
**Legislative determinations and intent**, §4-90-402.  
**Limitation of actions**, §4-90-416.  
**Notice of claim by consumer**, §4-90-404.  
**Option to retain use of vehicle**, §4-90-409.  
**Pet lemon law**, §4-97-105.  
**Presumption**.  
    Reasonable attempts to repair, §4-90-410.  
**Refunds**, §4-90-407.  
**Rental car**.  
    Reimbursement, §4-90-408.  
**Repairs**.  
    Documentation, §4-90-411.  
    Extension of time to repair.  
        War, invasion, strike, etc., §4-90-410.

**LEMON LAW —Cont'd****Repairs —Cont'd**

Presumption of reasonable attempts to repair, §4-90-410.

Refusal to make, §4-90-411.

Required warranty repairs, §4-90-405.

Failure to make, §4-90-406.

**Retention of use of vehicle.**

Option by consumer, §4-90-409.

**Sales.**

Resale of returned nonconforming vehicle, §4-90-412.

**Title of subchapter, §4-90-401.****Towing cost.**

Reimbursement, §4-90-408.

**LESSEE IN ORDINARY COURSE OF BUSINESS.****Secured transactions.**

Defined, rights taken, §4-9-321.

**LETTERS OF CREDIT, §§4-5-101 to 4-5-120.****Advisor.**

Obligations, §4-5-107.

**Applicability of chapter, §4-5-119.****Assignments.**

Proceeds, §4-5-114.

**Choice of law, §4-5-116.****Citation of article.**

Short title, §4-5-101.

**Confirmer.**

Obligations, §4-5-107.

**Consideration, §4-5-105.****Contracts.**

Sale of goods, §4-2-325.

**Definitions, §4-5-102.**

General commercial code definitions, §4-1-201.

Index of definitions, §4-5-102.

**Dishonor.**

Issuer's rights and obligations, §4-5-108.

Wrongful dishonor, §4-5-111.

**Establishment of credit.**

Effect, §4-5-106.

**Formal requirements, §4-5-104.****Fraud, §4-5-109.****Indemnity, §4-5-113.****Issuer.**

Rights and obligations, §4-5-108.

Security interest of, §4-5-118.

Subrogation to rights of beneficiary, §4-5-117.

**Nominated person.**

Security interest of, §4-5-118.

**Repudiation, §4-5-111.****Sales.**

Contracts for sale of goods, §4-2-325.

**LETTERS OF CREDIT —Cont'd****Savings clause, §4-5-120.****Scope of article, §4-5-103.****Secured transactions.**

Control of letter of credit right, §4-9-107.

Perfection and priority in letter of credit right.

Law governing, §4-9-306.

Perfection of letter of credit right by control, §4-9-314.

Perfection of security interest in letter of credit right, §4-9-312.

Priority of interest in letter of credit right, §4-9-329.

Restrictions on assignments of letter of credit rights, §4-9-409.

**Signatures, §4-5-104.****Statute of limitations, §4-5-115.****Subrogation of rights, §4-5-117.****Successor beneficiary, §4-5-113.****Terms, §4-5-106.****Title of article.**

Short title, §4-5-101.

**Transfer, §4-5-112.**

Operation of law, §4-5-113.

**Venue.**

Form for settling disputes, §4-5-116.

**Warranties, §4-5-110.****LICENSEE IN ORDINARY COURSE OF BUSINESS.****Secured transactions.**

Defined, rights taken, §4-9-321.

**LICENSES AND PERMITS.****Cigarettes and tobacco products.**

Sales, §4-75-707.

**Dental corporations.**

Employees, §4-29-408.

Officers, directors and shareholders, §4-29-407.

**Medical corporations.**

Employees, §4-29-308.

Officers, directors and shareholders required to be licensed, §4-29-307.

**Professional corporations.**

Employees, §4-29-209.

Officers, directors and shareholders, §4-29-208.

**LIENS.****Agricultural liens.**

Secured transactions.

Generally, §§4-9-101 to 4-9-709.

**Art.**

Consignment act.

Exemption from liens.

Works of art consigned for sale, §4-73-206.

**LIENS —Cont'd****Assignments.**

Nonnegotiable instruments.

Vendor's lien inures to benefit of assignee, §4-58-107.

**Bills of lading.**

Negotiation of bill for goods upon which there is lien or mortgage.

Penalty, §4-59-306.

**Carriers.**

Bills of lading, §4-7-307.

Enforcement of liens, §4-7-308.

**Documents of title.**

Warehouse's lien, §4-7-209.

Enforcement, §4-7-210.

**Investment securities.**

Issuer's lien, §4-8-209.

**Leases, UCC.**

Defined, §4-2A-103.

Priority of certain liens arising by operation of law, §4-2A-306.

Priority of liens arising by attachment or levy on security interests, §4-2A-307.

**Limited partnerships.**

Transferable interests.

Creditor's rights, §4-47-703.

**Partnerships.**

Limited partnerships.

Transferable interests.

Creditor's rights, §4-47-703.

Transferable interest of partner.

Charging order constitutes, §4-46-504.

**Secured transactions.**

Generally, §§4-9-101 to 4-9-709.

**Warehouse receipts.**

Negotiation of receipts by depositor of encumbered goods without disclosing facts.

Penalty, §4-59-406.

Warehouse's lien, §4-7-209.

Enforcement, §4-7-210.

**LIFE INSURANCE.**

**Benevolent institution, organization, etc., named as beneficiary,** §4-28-103.

**Charitable institution, organization, etc., named as beneficiary,** §4-28-103.

**Educational institution, organization, etc., named as beneficiary,** §4-28-103.

**Key-man life insurance.**

Nonprofit corporation purchasing with public funds, §4-28-103.

**Nonprofit corporations.**

Institution, organization, etc., named as beneficiary, §4-28-103.

**LIFE INSURANCE —Cont'd****Nonprofit corporations —Cont'd**

Key-man life insurance purchased with public funds, §4-28-103.

**Religious institution, organization, etc., named as beneficiary,** §4-28-103.

**LIMITATION OF ACTIONS.****Checks, §4-4-404.****Commercial code.**

Bank deposits and collections, §4-4-111.

Checks, §4-4-404.

Negotiable instruments.

Schedule of periods in which commence actions, §4-3-118.

Sales.

Contracts for sales and warranties, §4-2-725.

**Consumer protection, §4-88-115.**

**Contracts.**

Sale of goods, §4-2-725.

**Franchises.**

Petroleum products franchises.

Dealer-supplier or distributor franchises.

Cancellation, termination or refusal to renew, §4-72-503.

Supplier-distributor franchises.

Cancellation, termination or refusal to renew, §4-72-403.

**Fraudulent conveyances, §4-59-209.**

**Health-related discount cards not insurance.**

Action for violation, §4-106-202.

**Leases, UCC.**

Actions for default, §4-2A-506.

**Lemon law, §4-90-416.**

**Letters of credit, §4-5-115.**

**Limited liability companies.**

Appeal from secretary of state's refusal to file documents, §4-32-1302.

Known claims against dissolved companies, §4-32-907.

Unknown claims against dissolved companies, §4-32-908.

**Limited partnerships.**

Dissolution, claims not known at time of, §4-47-807.

Improper distributions, §4-47-509.

**Monopolies and restraint of trade.**

Actions by attorney general, §4-75-320.

Unfair practices.

Actions by attorney general, §4-75-217.

**Negotiable instruments, §4-3-118.**

**LIMITATION OF ACTIONS —Cont'd****Odometer tampering**, §4-90-207.**Pay per call.**

Consumer actions, §4-98-105.

**Sales.**Contracts for sales and warranties,  
§4-2-725.**Trade secrets.**

Misappropriation, §4-75-603.

**Warehouse receipts.**Contractual limitation of warehouse's  
liability, §4-7-204.**LIMITED LIABILITY COMPANIES,**

§§4-32-101 to 4-32-1316.

**Accounting for profit or benefit  
derived by member or manager,**  
§4-32-402.**Actions.**Authority to sue on behalf of company,  
§4-32-1102.Effect of lack of authority,  
§4-32-1103.

Parties to actions, §4-32-305.

Suits by and against companies,  
§4-32-1101.**Admission of members**, §4-32-801.**Admissions of members and  
managers as evidence against  
companies**, §4-32-302.**Agency power of members or  
managers**, §4-32-301.

Dissolution of company, §4-32-904.

**Appeals from secretary of state's  
refusal to file document,**  
§4-32-1302.**Article of amendment**, §4-32-203.**Articles of correction.**Correcting filed documents,  
§4-32-1309.**Articles of dissolution**, §4-32-906.Presumption of notice of dissolution  
upon filing, §4-32-904.**Articles of organization.**

Amendment, §4-32-203.

Content requirements, §4-32-202.

Delivery with secretary of state.  
Effect, §4-32-206.

Execution of documents, §4-32-204.

Filing with secretary of state,  
§4-32-205.

Effect, §4-32-206.

Required for formation of company,  
§4-32-201.

Restatement, §4-32-203.

**Assignment of company interest,**  
§4-32-704.Admission of assignee as member,  
§4-32-801.**LIMITED LIABILITY COMPANIES**

—Cont'd

**Assignment of company interest**

—Cont'd

Right of assignee to become member,  
§4-32-706.**Attorney general.**Foreign limited liability company  
transacting business without  
registration.Powers of attorney general,  
§4-32-1007.**Attorneys at law.**Company engaged in practice of law  
acting in fiduciary capacity,  
§4-32-307.Members, managers, etc., engaged in  
practice of law acting in fiduciary  
capacity on behalf of company,  
§4-32-307.**Benefits derived by members or  
managers.**

Accountability, §4-32-402.

**Binding effect of acts of members or  
managers**, §4-32-301.

Dissolution of company, §4-32-904.

**Certificate of existence**, §4-32-1311.**Claims against dissolved companies.**

Known claims, §4-32-907.

Unknown claims, §4-32-908.

**Conflict of laws.**

Foreign limited liability companies.

Law governing, §4-32-1001.

Governing law, §4-32-1314.

Interstate application of chapter,  
§4-32-1307.**Conservators for elderly and  
individuals with disabilities.**Powers as to member's interest,  
§4-32-707.**Construction of chapter**, §4-32-1304.**Contracts.**Liability of members, managers,  
agents, etc., §4-32-304.**Contributions to capital**, §4-32-501.

Liability, §4-32-502.

**Conversion.**

Articles of conversion, §4-32-1204.

Definitions, §4-32-1201.

Effect, §4-32-1205.

Filings required, §4-32-1204.

Plan of conversion, §4-32-1202.

Action on plan, §4-32-1203.

When effective, §4-32-1205.

**Conveyances.**Transfer of real property generally,  
§4-32-702.

**LIMITED LIABILITY COMPANIES**

—Cont'd

**Copies of filed documents.**

Evidentiary effect, §4-32-1310.

**Copying fees, §4-32-1301.****Criminal law and procedure.**

Signing false documents, §4-32-1312.

**Deceased members.**Powers of estate as to interest,  
§4-32-707.**Deceptively similar names, §4-32-103.****Definitions, §4-32-102.**

Knowledge, §4-32-1303.

**Dental or medical limited liability companies, §4-32-1401.****Dissociation of member.**

Dissolution upon, §4-32-901.

Distributions on event of dissociation,  
§4-32-602.

Events of dissociation, §4-32-802.

**Dissolution, §§4-32-901 to 4-32-908.**Agency powers of managers or  
members, §4-32-904.

Articles of dissolution, §4-32-906.

Claims against dissolved companies.

Known claims, §4-32-907.

Unknown claims, §4-32-908.

Distribution of assets, §4-32-905.

Grounds, §4-32-901.

Judicial dissolution, §4-32-902.

Winding up, §4-32-903.

**Distributions.**

Dissociation, §4-32-602.

Dissolution, §4-32-905.

In kind, §4-32-603.

Right to, §4-32-604.

Sharing of interim distributions,  
§4-32-601.**Documents required to be filed with secretary of state.**

Appeal from refusal to file, §4-32-1302.

Correcting filed documents,  
§4-32-1309.

Evidentiary effect of copy, §4-32-1310.

Execution, §4-32-204.

Filing requirements, §4-32-1308.

Filing with secretary of state,  
§4-32-205.

Signing false documents, §4-32-1312.

**Duties of managers and members, §4-32-402.****Estates of deceased or incompetent members.**

Powers, §4-32-707.

**Events of dissociation, §4-32-802.****Evidence.**Admissions or representations of  
members and managers,  
§4-32-302.**LIMITED LIABILITY COMPANIES**

—Cont'd

**Evidence —Cont'd**

Certificates of existence, §4-32-1311.

Copies of filed documents, §4-32-1310.

Regality of organization and formation  
of company.

Articles of organization, §4-32-206.

**Execution of documents required to be filed with secretary of state, §4-32-204.****Executors and administrators.**Company engaged in practice of law  
acting as, §4-32-307.Powers as to deceased member's  
interest, §4-32-707.**False documents.**

Signing, §4-32-1312.

**Fees.**Filing, service and copying fees,  
§4-32-1301.**Fictitious names, conducting business under, §4-32-108.****Fiduciaries.**Companies engaged in practice of law  
acting as fiduciary, §4-32-307.Members, managers, etc., engaged in  
practice of law acting in fiduciary  
capacity on behalf of company,  
§4-32-307.**Filing documents, §4-32-205.**Appeals from secretary of state's  
refusal to file, §4-32-1302.Correcting filed documents,  
§4-32-1309.

Evidentiary effect of copy, §4-32-1310.

Execution, §4-32-204.

Requirements, §4-32-1308.

Signing false documents, §4-32-1312.

**Filing fees, §4-32-1301.****Foreign limited liability companies, §§4-32-1001 to 4-32-1008.**

Law governing, §4-32-1001.

Name, §4-32-1004.

Registered name, §4-32-109.

Reservation, §4-32-104.

Penalties for transacting business  
without registration, §4-32-1007.**Registration.**

Amendments, §4-32-1005.

Articles of amendment, §4-32-1005.

Cancellation, §4-32-1006.

Certificate of cancellation,  
§4-32-1006.Content requirements of application,  
§4-32-1002.

Issuance, §4-32-1003.

Name, §4-32-1004.

**LIMITED LIABILITY COMPANIES**

—Cont'd

**Foreign limited liability companies**

—Cont'd

Registration —Cont'd

Required, §4-32-1002.

Transacting business without,  
§4-32-1007.Transactions not constituting  
transacting business,  
§4-32-1008.

Reservation of name, §4-32-104.

Service of process.

Companies transacting business  
without registration, §4-32-1007.Transacting business without  
registration, §4-32-1007.Transactions not constituting  
transacting business,  
§4-32-1008.**Formation, §4-32-201.**Amendment of articles of organization,  
§4-32-202.

Certificate of existence, §4-32-1311.

Content requirements of articles of  
organization, §4-32-202.Effect of delivery or filing of articles  
with secretary of state, §4-32-206.Restatement of articles of  
organization, §4-32-203.**Fraud.**Notice or knowledge to member or  
manager charged to company,  
§4-32-303.**Full faith and credit of chapter,  
§4-32-1315.****Governing law, §4-32-1314.****Guardians.**Company engaged in practice of law  
acting as, §4-32-307.Powers as to incompetent member's  
interest, §4-32-707.**Income tax status, §4-32-1313.****Incompetent members.**Powers of estate as to interest,  
§4-32-707.**Indemnification of members and  
managers, §4-32-404.****In kind distributions, §4-32-603.****Inspection of records by members,  
§4-32-405.****Interstate application of chapter,  
§4-32-1307.****Interstate commerce.**Foreign limited liability companies.  
Transactions not constituting  
transacting business,  
§4-32-1008.**LIMITED LIABILITY COMPANIES**

—Cont'd

**Invalidity of provisions of chapter.**Other provisions not effected,  
§4-32-1306.**Judgment creditor rights, §4-32-705.****Judicial dissolution, §4-32-902.****“Knowledge” defined, §4-32-1303.****Knowledge of members or managers.**Charge to limited liability companies,  
§4-32-303.**Liability of company to third  
parties, §4-32-309.****Liability of members, managers,  
agents, etc., §4-32-304.**Limitation of members' or managers'  
liability, §4-32-404.**Limitation of actions.**Appeal from secretary of state's  
refusal to file documents,  
§4-32-1302.Known claims against dissolved  
companies, §4-32-907.Unknown claims against dissolved  
companies, §4-32-908.**Management of company, §4-32-401.****Managers.**Admissions or representations as  
evidence against company,  
§4-32-302.

Agency power, §4-32-301.

Dissolution, §4-32-904.

Attorney managers performing  
fiduciary responsibilities on behalf  
of company, §4-32-307.Authority to sue on behalf of company,  
§4-32-1102.Effect of lack of authority,  
§4-32-1103.

Duties, §4-32-402.

Indemnification, §4-32-404.

Knowledge or notice charged to limited  
liability company, §4-32-303.

Limitation of liability, §4-32-404.

Personal liability for debts, obligations  
or liabilities, §4-32-304.Responsibility or accountability for  
acts or failures to act, §4-32-402.**Medical or dental limited liability  
companies, §4-32-1401.****Members.**

Admission, §4-32-801.

Admissions or representations as  
evidence against company,  
§4-32-302.

Agency power, §4-32-301.

Dissolution of company, §4-32-904.

**LIMITED LIABILITY COMPANIES**

—Cont'd

**Members —Cont'd**

- Assignment of interest, §4-32-704.
- Admission of assignee as member, §4-32-801.
- Right of assignee to become member, §4-32-706.
- Attorney members performing fiduciary responsibilities on behalf of company, §4-32-307.
- Authority to sue on behalf of company, §4-32-1102.
- Effect of lack of authority, §4-32-1103.
- Consent to dissolution, §4-32-901.
- Contributions, §4-32-501.
- Deceased members.
  - Powers of estate, §4-32-707.
- Dissociation.
  - Dissolution upon, §4-32-901.
  - Distributions, §4-32-602.
  - Events, §4-32-802.
- Distributions.
  - Dissociation, §4-32-602.
  - In kind distributions, §4-32-603.
  - Right to distribution, §4-32-604.
  - Sharing in interim distributions, §4-32-601.
- Duties, §4-32-402.
- Incompetent members.
  - Powers of estate, §4-32-707.
- Indemnification, §4-32-404.
- Inspection of records, §4-32-405.
- Judgment creditor rights, §4-32-705.
- Knowledge or notice.
  - Charged to limited liability company, §4-32-303.
- Liability, §4-32-502.
  - Liability to third parties, §4-32-304.
- Limitation of liability by written agreement, §4-32-404.
- Management of company vested in, §4-32-401.
- Parties to actions, §4-32-305.
- Personal liability for debts, obligations or liabilities, §4-32-304.
- Profit sharing, §4-32-503.
- Responsibility or accountability for acts or failures to act, §4-32-402.
- Voting, §4-32-403.

**Merger.**

- Articles of merger, §4-32-1208.
- Effect of merger, §4-32-1209.
- Filings required, §4-32-1208.
- Foreign organization, §4-32-1209.
- Plan of merger, §4-32-1206.
  - Action on plan, §4-32-1207.

**LIMITED LIABILITY COMPANIES**

—Cont'd

**Merger —Cont'd**

- Supplemental nature of provisions, §4-32-1210.
- Names**, §4-32-103.
  - Fictitious names, conducting business under, §4-32-108.
  - Foreign limited liability companies.
    - Registered name, §4-32-109.
    - Requirements for registration, §4-32-1004.
    - Reservation, §4-32-104.
- Nature of business of limited liability company**, §4-32-106.
- Nature of limited liability company interest**, §4-32-703.
- Notice of dissolution.**
  - Filing of articles of dissolution constitutes, §4-32-904.
- Notice to claimants upon dissolution.**
  - Known claimants, §4-32-907.
  - Unknown claimants, §4-32-908.
- Notice to member or manager.**
  - Charged to limited liability company, §4-32-303.
- Ownership of company property**, §4-32-701.
- Parties to actions**, §4-32-305.
- Penalties.**
  - Foreign limited liability company transacting business without registration, §4-32-1007.
- Personal property.**
  - Foreign limited liability companies.
    - Transactions not constituting transacting business, §4-32-1008.
  - Nature of limited liability company interest, §4-32-703.
- Petitions.**
  - Secretary of state's refusal to file documents, §4-32-1302.
- Policy of chapter**, §4-32-1304.
- Powers**, §4-32-106.
- Powers of attorney.**
  - Executing documents under powers of attorney, §4-32-204.
- Presumption of notice of dissolution.**
  - Filing of articles of dissolution, §4-32-904.
- Professional service limited liability company.**
  - Executors, administrators or other fiduciary capacity.
    - Companies engaged in practice of law acting as, §4-32-307.

**LIMITED LIABILITY COMPANIES**

—Cont'd

**Professional service limited liability company —Cont'd**

Liability of individuals for acts or omissions, §4-32-308.

Liability of member, manager or employee for others acts or omissions, §4-32-308.

Name, §4-32-103.

Nonprofessional employees and agents rendering services, §4-32-306.

Repeal of laws in conflict, §4-32-1316.

Requirements for rendering professional services, §4-32-306.

**Profits derived by member or manager.**

Accountability, §4-32-402.

**Profit sharing, §4-32-503.****Property ownership, §4-32-701.****Publication.**

Notice to unknown claimants of dissolved companies, §4-32-908.

**Purposes for which companies may be organized, §4-32-106.****Real property.**

Acquired in name of company, §4-32-701.

Foreign limited liability companies.

Transactions not constituting transacting business, §4-32-1008.

Transfer, §4-32-702.

**Records.**

Inspection by members, §4-32-405.

Records required to be kept at place of business, §4-32-405.

**Registered agent.**

Model registered agents act, §§4-20-101 to 4-20-118.

**Registration.**

Foreign limited liability companies.

Amendments, §4-32-1005.

Articles of amendment, §4-32-1005.

Cancellation, §4-32-1006.

Certificate of cancellation, §4-32-1006.

Content requirements of application, §4-32-1002.

Issuance, §4-32-1003.

Name, §4-32-1004.

Required, §4-32-1002.

Transacting business without, §4-32-1007.

Transactions not constituting transacting business, §4-32-1008.

**LIMITED LIABILITY COMPANIES**

—Cont'd

**Repealer of laws and conflict, §4-32-1316.****Representations by members and managers as evidence against company, §4-32-302.****Reservation of name, §4-32-104.****Restatement of articles of organization, §4-32-203.****Rights of judgment creditor, §4-32-705.****Right to distribution, §4-32-604.****Secretary of state.**

Amendment of articles of organization.

Filing articles of amendment with secretary, §4-32-203.

Appeal from secretary's refusal to file documents, §4-32-1302.

Certificates of existence.

Applications to secretary for, §4-32-1311.

Dissolution of company.

Filing articles of dissolution with, §4-32-906.

Fees for filing, service and copying, §4-32-1301.

Foreign limited liability company registration.

Cancellation, §4-32-1006.

Filing articles of amendments with secretary, §4-32-1005.

Issuance of registration, §4-32-1001.

Transacting business without.

Service of process upon secretary, §4-32-1007.

Powers, §4-32-1305.

Reservation of name by company.

Filing reservation with, §4-32-104.

Restatement of articles of organization.

Filing restated articles with secretary, §4-32-203.

**Service of process.**

Fee, §4-32-1301.

Foreign limited liability companies transacting business without registration, §4-32-1007.

**Severability of provisions, §4-32-1306.****Sharing of profits, §4-32-503.****Signing of documents required to be filed with secretary of state, §4-32-204.****Small business entity tax pass through act.**

Title of chapter, §4-32-101.

**LIMITED LIABILITY COMPANIES**

—Cont'd

**Statute of limitations.**

Appeal from secretary of state's refusal to file documents, §4-32-1302.

Known claims against dissolved companies, §§4-32-907, 4-32-908.

**Suits by and against companies,** §4-32-1101.

Authority to sue on behalf of company, §4-32-1102.

Effect of lack of authority, §4-32-1103.

**Tax status,** §4-32-1313.**Third parties.**

Liability of company to, §4-32-309.

Liability of members to, §4-32-304.

**Title of chapter.**

Small business entity tax pass through act, §4-32-101.

**Title to real property,** §4-32-701.**Torts.**

Liability of members, managers, agents, etc., §4-32-304.

**Transfer of real property,** §4-32-702.**Trustees.**

Companies engaged in practice of law acting as, §4-32-307.

Profits or benefits derived by member or manager held at, §4-32-402.

**Voting by members,** §4-32-403.**Winding up.**

Distribution of assets, §4-32-905.

**LIMITED LIABILITY**

**PARTNERSHIPS,** §§4-46-1001 to 4-46-1105.

**Annual report.**

Required, filing, §4-46-1003.

**Authority to become limited liability partnership,** §4-46-1001.**Continues as same entity as existed before filing,** §4-46-201.**Foreign limited liability partnerships,** §§4-46-1101 to 4-46-1105.

Action by attorney general, §4-46-1105.

Activities not constituting transacting business, §4-46-1104.

Failure to qualify, effect, §4-46-1103.

Governing law, §4-46-1101.

Relations among partners. Governing law, §4-46-1101.

Statement of qualification, §4-46-1102.

Failure to qualify, effect, §4-46-1103.

**Transacting business.**

Activities not constituting, §4-46-1104.

**LIMITED LIABILITY**

**PARTNERSHIPS** —Cont'd

**Name.**

Requirements, §4-46-1002.

**Notice.**

Intent to revoke statement of qualification.

Failure to file annual report, §4-46-1003.

**Obligation incurred.**

Solely obligation of partnership, §4-46-306.

**Registered agents.**

Model registered agents act, §§4-20-101 to 4-20-118.

**Reports.**

Annual report.

Required, filing, §4-46-1003.

**Statement of qualification,**

§4-46-1001.

Foreign limited liability partnerships, §4-46-1102.

Failure to qualify, effect, §4-46-1103.

**Revocation.**

Failure to file annual report, §4-46-1003.

**Terms and conditions of partnership.**

Vote of partners required to approve, §4-46-1001.

**Time.**

Annual report.

Filing, §4-46-1003.

**LIMITED PARTNERSHIPS,**

§§4-47-101 to 4-47-1302.

**Actions.**

Derivative actions, §§4-47-1002 to 4-47-1005.

Direct action by partner, §4-47-1001.

**General partners.**

Effect of actions by and against partnership and partners, §4-47-405.

Liability for consent to improper distributions, §4-47-509.

**Agents.**

General partners.

Agent of partnership, §4-47-402.

**Applicability of provisions.**

Existing relationships, §4-47-1206.

Foreign limited partnerships, §4-47-901.

Law governing relationships and liability, §4-47-106.

Partnership agreement, effect and scope, §4-47-110.

Principles of law and equity, §4-47-107.

**LIMITED PARTNERSHIPS —Cont'd****Applicability of provisions —Cont'd**

Uniformity of application and construction, §4-47-1201.

**Articles of conversion**, §4-47-1104.

**Articles of merger**, §4-47-1108.

**Business transactions of partner with partnership**, §4-47-112.

**Certificate of authority, foreign limited partnerships.**

Activities not constituting transactions of business, §4-47-903.

Application, §4-47-902.

Cancellation, §4-47-907.

Filing, §4-47-904.

Revocation, §4-47-906.

**Certificate of limited partnership.**

Amendment, §4-47-202.

Certificate of existence, §4-47-209.

Contents, §4-47-201.

Filing.

Constructive notice, §4-47-103.

Required, §4-47-201.

Restatement, §4-47-202.

Signing of records, §§4-47-204, 4-47-205.

**Citation of provisions**, §4-47-101.

**Conflicting names.**

Application for authorization to use, §4-47-108.

**Consent of partners.**

Actions taken requiring, §4-47-118.

**Construction of statutory provisions.**

Conversion and merger, §4-47-1113.

Effective date, §4-47-1204.

Effect of designation, §4-47-1208.

Electronic signatures in global commerce act.

Relationship, §4-47-1203.

Savings clause, §4-47-1207.

Severability, §4-47-1202.

Uniformity of application and construction, §4-47-1201.

**Contributions.**

Conversion and merger.

Liability of general partner following conversion or merger, §4-47-1111.

Disposition of assets at dissolution, §4-47-812.

Form of contribution, §4-47-501.

Obligation to contribute, §4-47-502.

**Conversion and merger**, §§4-47-1101 to 4-47-1113.

Articles of conversion, §4-47-1104.

Articles of merger, §4-47-1108.

**LIMITED PARTNERSHIPS —Cont'd****Conversion and merger —Cont'd**

Construction of statutory provisions, §4-47-1113.

Definitions, §4-47-1101.

Effective date of conversion, §4-47-1104.

Effect of conversion, §4-47-1105.

Effect of merger, §4-47-1109.

Foreign organization that is converted.

Consent to jurisdiction, §4-47-1105.

Foreign organization that is survivor of merger.

Consent to jurisdiction, §4-47-1109.

Liability of general partner following conversion or merger, §4-47-1111.

Limitations and restrictions on conversion and merger, §4-47-1110.

Plan of conversion, §4-47-1103.

Plan of merger, §§4-47-1106, 4-47-1107.

Power to bind organization following conversion or merger, §4-47-1112.

Prerequisites to conversion, §4-47-1102.

Prerequisites to merger, §4-47-1106.

**Correcting of filed records**, §4-47-207.

**Creditor's rights.**

Assets, disposition at dissolution, §4-47-812.

Claims against general partner, barring of, §4-47-808.

Claims known at time of dissolution, §4-47-806.

Claims not known at time of dissolution, §4-47-807.

Transferable interests, §4-47-703.

**Death of partner.**

Disposition of assets at dissolution, liability of estate, §4-47-812.

Powers of estate of deceased partner, §4-47-704.

**Definitions**, §4-47-102.

Conversion and merger, §4-47-1101.

**Delivery of records to secretary of state**, §4-47-206.

**Derivative actions**, §§4-47-1002 to 4-47-1005.

Complaints, §4-47-1004.

Proceeds and costs, §4-47-1005.

Proper plaintiff, §4-47-1003.

Right to maintain, §4-47-1002.

**Designation as, effect of**, §4-47-1208.

**Dissociation**, §§4-47-601 to 4-47-607.

Conversion and merger.

Power to bind organization following conversion or merger, §4-47-1112.

**LIMITED PARTNERSHIPS —Cont'd****Dissociation —Cont'd**

- Distributions not made due to, §4-47-505.
- General partners, §4-47-603.
  - Binding of partnership after dissociation but before dissolution, §4-47-606.
  - Effect of dissociation, §4-47-605.
  - Liability for obligations prior to and after dissociation, §4-47-607.
  - Wrongful dissociation, §4-47-604.
- Limited partners, §4-47-601.
  - Effect of dissociation, §4-47-602.
- Notice of, §4-47-103.

**Dissolution, §§4-47-801 to 4-47-812.**

- Administrative dissolution, §4-47-809.
  - Reinstatement following, §4-47-810.
    - Appeal of denial, §4-47-811.
- Assets, disposition of, §4-47-812.
- Claims against general partner, barring of, §4-47-808.
- Claims known at time of dissolution, §4-47-806.
- Claims not known at time of dissolution, §4-47-807.
- General partner, claims against, §4-47-808.
- Judicial dissolution, §4-47-802.
- Liability for obligations incurred after, §4-47-805.
- Nonjudicial dissolution, §4-47-801.
- Power to bind partnership after, §4-47-804.
- Requirements for nonjudicial dissolution, §4-47-801.
- Statement of termination, §4-47-203.
  - Signatures, §§4-47-204, 4-47-205.
- Winding up, §4-47-803.

**Distributions.**

- Dissociation, no distribution due to, §4-47-505.
- Form, §4-47-506.
- Improper distributions, §4-47-509.
- In kind distribution, §4-47-506.
- Interim distributions, §4-47-504.
- Limitations and restrictions, §4-47-508.
- Offsets for amounts owed to partnership, §4-47-507.
- Right to generally, §4-47-507.
- Sharing among partners, §4-47-503.

**Dual capacity of partner, §4-47-113.****Duration of entity, §4-47-104.****Electronic signatures in global commerce act.**

- Relationship, §4-47-1203.

**LIMITED PARTNERSHIPS —Cont'd****Existing relationships, applicability, §4-47-1206.****False information in records, §4-47-208.****Fees.**

- Filing fees, §§4-47-1301, 4-47-1302.

**Filing of records by secretary of state, §4-47-206.**

- Fees, §§4-47-1301, 4-47-1302.

**Foreign limited partnerships, §§4-47-901 to 4-47-908.**

- Action to restrain transacting of business, §4-47-908.
- Activities not constituting transactions of business, §4-47-903.
- Certificate of authority.
  - Activities not constituting transactions of business, §4-47-903.
  - Application, §4-47-902.
  - Cancellation, §4-47-907.
  - Filing, §4-47-904.
  - Revocation, §4-47-906.
- Law governing, §4-47-901.
- Names, §4-47-905.
- Ownership of property.
  - Activities constituting transactions of business, §4-47-903.

**Formation, §§4-47-201 to 4-47-210.****Future limited partnerships.**

- Formation, §4-47-1209.

**General partners, §§4-47-401 to 4-47-408.**

- Actions by and against partnership and partners, §4-47-405.
- Agent of partnership, §4-47-402.
- Becoming a general partner, §4-47-401.
- Binding the partnership, §4-47-402.
- Conduct, standards of, §4-47-408.
- Consent of, when necessary, §4-47-406.
- Conversion and merger.
  - Liability of general partner following conversion or merger, §4-47-1111.
  - Power to bind organization following conversion or merger, §4-47-1112.
- Dissociation, §4-47-603.
  - Binding of partnership after dissociation but before dissolution, §4-47-606.
  - Effect of dissociation, §4-47-605.
  - Liability for obligations prior to and after dissociation, §4-47-607.
  - Wrongful dissociation, §4-47-604.

**LIMITED PARTNERSHIPS —Cont'd****General partners —Cont'd****Dissolution.**

Liability for obligations incurred after, §4-47-805.

Power to bind partnership after, §4-47-804.

**Distributions.**

Liability for consent to improper distributions, §4-47-509.

Dual capacity as limited partner, §4-47-113.

Execution of judgments against, §4-47-405.

Fiduciary duties, §4-47-408.

Liability of generally, §4-47-404.

Liability of partnership for actionable conduct of, §4-47-403.

Management rights, §4-47-406.

Reimbursement of, §4-47-406.

Right to information, §4-47-407.

Standards of conduct and duties owed to partnership, §4-47-408.

**General provisions, §§4-47-101 to 4-47-118.**

**Indebtedness.**

Distributions, §4-47-508.

**Information to be kept at designated office, §4-47-111.**

Limited partners.

Demand for information, §4-47-304.

**Interest rates, §4-47-107.**

**Knowledge.**

When person has notice and knowledge, §4-47-103.

**Law governing relationships and liability, §4-47-106.**

**Liability.****Contributions.**

Obligation to contribute, §4-47-502.

**Conversion and merger.**

Liability of general partner following conversion or merger, §4-47-1111.

Limitations and restrictions on conversion and merger, §4-47-1110.

**Dissociation.**

Binding of partnership after dissociation but before dissolution, §4-47-606.

Liability for obligations prior to and after dissociation, §4-47-607.

Wrongful dissociation, §4-47-604.

**Dissolution.**

Liability for obligations incurred after, §4-47-805.

**LIMITED PARTNERSHIPS —Cont'd****Liability —Cont'd****Distributions.**

Improper distributions, §4-47-509.

General partners, §4-47-404.

Limited partners, §4-47-303.

Partnership, liability for actionable conduct of general partner, §4-47-403.

**Limitation of actions.**

Dissolution, claims not known at time of, §4-47-807.

Improper distributions, §4-47-509.

**Limited partners, §§4-47-301 to 4-47-306.**

Becoming a limited partner, §4-47-301.

Demand for information, §4-47-304.

Dissociation, §4-47-601.

Dual capacity as general partner, §4-47-113.

Duties, §4-47-305.

Liability generally, §4-47-303.

Person erroneously believing self as limited partner, §4-47-306.

Power to bind partnership, §4-47-302.

**Loans.**

Business transactions of partner with partnership, §4-47-112.

**Merger.**

Conversion and merger, §§4-47-1101 to 4-47-1113.

**Names, §4-47-108.**

Foreign limited partnerships, §4-47-905.

Reservation of name, §4-47-109.

**Nature of entity, §4-47-104.**

**Notice.****Dissolution.**

Claims known at time of dissolution, §4-47-806.

Claims not known at time of dissolution, §4-47-807.

**Foreign limited partnerships.**

Certificate of authority, revocation, §4-47-906.

When person has notice and knowledge, §4-47-103.

**Order for signature or unsigned filing of document, §4-47-205.**

**Partnership agreements.**

Conversion and merger, limitations and restrictions, §4-47-1110.

Distributions in violation of, prohibited, §4-47-508.

Effect and scope, §4-47-110.

Inconsistency with certificate of limited partnership, §4-47-201.

**Powers, §4-47-105.**

**LIMITED PARTNERSHIPS —Cont'd**

**Priority of disposition of assets at dissolution**, §4-47-812.

**Proxies of partners for consent purposes**, §4-47-118.

**Purpose of entity**, §4-47-104.

**Records.**

Correcting of filed records, §4-47-207.

Delivery to and filing by secretary of state, §4-47-204.

Filing of records by secretary of state, §4-47-206.

General partners.

Right to information, §4-47-407.

Information to be kept at designated office, §4-47-111.

Liability for false information, §4-47-208.

Limited partners.

Right to inspect and request information, §4-47-304.

Signing of records, §§4-47-204, 4-47-205.

**Registered agents.**

Change of office and agent for service, §4-47-115.

Designation of office and agent for service, §4-47-114.

Model registered agents act, §§4-20-101 to 4-20-118.

**Reinstatement following administrative dissolution**, §4-47-810.

Appeal of denial, §4-47-811.

**Reports.**

Annual report to secretary of state, §4-47-210.

**Service of process.**

Administrative dissolution.

Appeal of denial of reinstatement, §4-47-811.

Change of office and agent for service, §4-47-115.

Conversion and merger.

Foreign organization that is converted.

Consent to jurisdiction, §4-47-1105.

Foreign organization that is survivor of merger.

Consent to jurisdiction, §4-47-1109.

Designation of office and agent for service, §4-47-114.

**Severability of provisions**, §4-47-1202.**Signatures.**

Records filed with secretary, §§4-47-204, 4-47-205.

**LIMITED PARTNERSHIPS —Cont'd**

**Statement of termination**, §4-47-203.

Signatures, §§4-47-204, 4-47-205.

**Statute of limitations.**

Dissolution, claims not known at time of, §4-47-807.

Improper distributions, §4-47-509.

**Supplemental principles of law and equity**, §4-47-107.**Title of provisions**, §4-47-101.**Transferable interests.**

Creditor's rights, §4-47-703.

Effect of transfer, §4-47-702.

Estate of deceased partner, rights of, §4-47-704.

Status as personal property, §4-47-701.

Transfer of, §4-47-702.

**Winding up**, §4-47-803.

Statement of termination, §4-47-203.

Signatures, §§4-47-204, 4-47-205.

**LIQUIDATION.**

**Going out of business sales**, §§4-74-101 to 4-74-111.

**LITERARY ORGANIZATIONS.****Nonprofit corporations.**

Articles of incorporation.

Default provisions, §4-33-150.

**LITERATURE.****Corporations.**

Religious, literary, benevolent, etc., corporations.

Fees of secretary of state, §4-28-102.

**Nonprofit corporations.**

Fees for religious, literary, benevolent, etc., corporations, §4-28-102.

**LIVESTOCK.****Farm machinery.**

Hour meters on farm machinery, §§4-96-201, 4-96-202.

Alteration prohibited, §4-96-201.

Conspiracy to violate subchapter, §4-96-202.

Misdemeanors.

Violation of subchapter, §4-96-202.

Tampering prohibited, §4-96-201.

**LOANS.****Corporations.**

Directors.

Loans to directors, §4-27-832.

**Income tax.**

Refund anticipation loans, §§4-116-101 to 4-116-108.

**Limited partnerships.**

Business transactions of partner with partnership, §4-47-112.

**LOANS —Cont'd****Nonprofit corporations.**

Prohibited to directors and officers,  
§4-28-220.

**Nonprofit corporations (1993).**

Loans to directors and officers,  
§4-33-832.

**Refund anticipation loans,**

§§4-116-101 to 4-116-108.

**Secured transactions.**

Generally, §§4-9-101 to 4-9-709.

**LOST INSTRUMENTS AND RECORDS.****Negotiable instruments, §4-3-309.**

Cashier's check, teller's check or  
certified check, §4-3-312.

**LOST OUR LEASE SALES.**

General provisions, §§4-74-101 to  
4-74-111.

**LUBRICANTS.**

Quality specifications for engine  
fuels, petroleum products and  
automotive lubricants,  
§§4-108-201 to 4-108-213.

**M****MACHINERY.**

Retailer franchise protection,  
§§4-72-301 to 4-72-311.

**MAIL.****Registered agents.**

Method of service on, §4-20-113.

**Service of process.**

Registered agents.

Method of service on, §4-20-113.

**Solicitation.**

Mail and telephone solicitation sales,  
§§4-95-101 to 4-95-108.

**MAIL AND TELEPHONE SOLICITATION SALES,**  
§§4-95-101 to 4-95-108.

Citation of act, §4-95-101.

**Consumer product.**

Defined, §4-95-102.

**Definitions, §4-95-102.****Division.**

Defined, §4-95-102.

**Exemptions from act, §4-95-107.****Gift or prize.**

Defined, §4-95-102.

**Identification of caller, §4-99-201.****Inapplicability of act, §4-95-107.****Injunctions.**

Unlawful practices, §4-95-104.

**MAIL AND TELEPHONE****SOLICITATION SALES —Cont'd****Offers of gifts and prizes.**

"Gift or prize" defined, §4-95-102.

Unlawful practices, §4-95-105.

**Penalties.**

Civil penalties, §4-95-104.

Criminal penalties, §4-95-103.

Violations of act.

Voidness and unenforceability of  
purchase agreements, §4-95-108.

**Product promoter.**

Defined, §4-95-102.

**Purchase agreements.**

Contents, §4-95-106.

Disclosure statement, §4-95-106.

Generally, §4-95-106.

Violation of act.

Voidness and unenforceability of  
agreement, §4-95-108.

Waiver or attempt to waive provisions.

Voidness and unenforceability of act,  
§4-95-108.

Title of act, §4-95-101.

**Unlawful practices.**

Civil penalties, §4-95-104.

Criminal penalties, §4-95-103.

Offers of gifts or prizes, §4-95-105.

"Gift or prize" defined, §4-95-102.

**MAIL ORDERS.****Foreign limited liability companies.**

Transactions not constituting  
transacting business, §4-32-1008.

**MARKETING.**

Mail and telephone solicitation  
sales, §§4-95-101 to 4-95-108.

**MARRIAGE.****Statute of frauds.**

Charges upon agreements made in  
consideration of marriage,  
§4-59-101.

**MEDIA.****Monopolies and restraint of trade.**

Discrimination.

News furnishing, §4-75-503.

**MEDICAL CORPORATIONS.****Amendments.**

Registration certificates, §4-29-309.

**Appeals.**

Suspension or revocation of  
registration certificates, §4-29-311.

Notice of appeal, §4-29-311.

Application of business corporation  
act, §4-29-303.

**Assignments.**

Registration.

Certificates, §4-29-309.

**MEDICAL CORPORATIONS —Cont'd****Business corporation act.**

Application, §4-29-303.

**Certificates.**

Registration, §4-29-309.

Amendment of certificate, §4-29-309.

Annual renewal, §4-29-309.

Assignment, §4-29-309.

Posting, §4-29-309.

Suspension or revocation, §4-29-309.

Appeals, §4-29-311.

Notice, §4-29-311.

**Citation of act, §4-29-301.****Construction and interpretation.**

Business corporation act.

Applicability of business corporation act, §4-29-303.

Physician-patient relationship unaltered, §4-29-304.

**Conversion to business corporation, §4-29-204.****Corporate name, §4-29-306.****Definitions, §4-29-302.****Directors.**

License requirements, §4-29-307.

**Employees.**

Licenses, §4-29-308.

**Formation of corporation.**

Procedure, §4-29-305.

**Hearings.**

Suspension or revocation of registration certificates, §4-29-310.

**Liability.**

Physician-patient relationship unaltered, §4-29-304.

**Licenses.**

Employees, §4-29-308.

Officers, directors and shareholders required to be licensed, §4-29-307.

**Limited liability companies.**

Medical or dental limited liability companies, §4-32-1401.

**Malpractice.**

Physician-patient relationship unaltered, §4-29-304.

**Names.**

Corporate name, §4-29-306.

**Notice.**

Suspension or revocation of registration certificates, §4-29-310.

Notice of appeal, §4-29-311.

**Officers.**

License requirements, §4-29-307.

**Offices.**

Change of location.

Amendment of certificate, §4-29-309.

**Physician-patient relationship.**

Effect of act upon applicable law, §4-29-304.

**MEDICAL CORPORATIONS —Cont'd****Purposes of corporations, §4-29-306.****Registration.**

Certificate, §4-29-309.

Amendment, §4-29-309.

Annual renewal, §4-29-309.

Assignment, §4-29-309.

Posting, §4-29-309.

Suspension or revocation, §4-29-310.

Appeal, §4-29-311.

Notice of appeal, §4-29-311.

**Stock and stockholders.**

License requirements, §4-29-307.

Shares of deceased or disqualified shareholders, §4-29-312.

**Title of act, §4-29-301.****MEDICAL MALPRACTICE.****Medical corporations.**

Physician-patient relationship unaltered, §4-29-304.

**MEDICAL OR DENTAL LIMITED LIABILITY COMPANIES, §4-32-1401.****MENTAL ANGUISH.****Sale of goods.**

Buyer damages for non-conforming goods, §4-2-714.

**MERCHANTABILITY, WARRANTY OF.****Commercial code.**

Leases.

Implied warranty, §4-2A-212.

Sale of goods.

Implied warranty, §4-2-314.

Exclusion or modification, §4-2-316.

**MERGER OR CONSOLIDATION.****Foreign business trust, §4-31-405.****Limited liability companies,**

§§4-32-1206 to 4-32-1210.

**Limited partnerships, conversion and merger, §§4-47-1101 to 4-47-1113.**

Articles of conversion, §4-47-1104.

Articles of merger, §4-47-1108.

Construction of statutory provisions, §4-47-1113.

Definitions, §4-47-1101.

Effective date of conversion, §4-47-1104.

Effect of conversion, §4-47-1105.

Effect of merger, §4-47-1109.

Foreign organization that is converted.

Consent to jurisdiction, §4-47-1105.

Foreign organization that is survivor of merger.

Consent to jurisdiction, §4-47-1109.

**MERGER OR CONSOLIDATION**

—Cont'd

**Limited partnerships, conversion and merger** —Cont'd

Liability of general partner following conversion or merger, §4-47-1111.

Limitations and restrictions on conversion and merger, §4-47-1110.

Plan of conversion, §4-47-1103.

Plan of merger, §§4-47-1106, 4-47-1107.

Power to bind organization following conversion or merger, §4-47-1112.

Prerequisites to conversion, §4-47-1102.

Prerequisites to merger, §4-47-1106.

**Nonprofit corporations (1993).**

Action on plan by board, members and third persons, §4-33-1103.

Approval of plan, §4-33-1101.

Articles of incorporation.

Inclusion of certain provisions of charitable, religious, etc., organizations, §4-28-207.

Articles of merger, §4-33-1104.

Continuation of prior corporate existence for limited purpose, §4-33-1108.

Effect of merger, §4-33-1105.

Foreign corporation, §4-33-1106.

Limitations on mergers by public benefit or religious corporations, §4-33-1102.

Requests, devises and gifts, §4-33-1107.

**Partnerships, §§4-46-906 to 4-46-913.****Unincorporated nonprofit associations, §4-28-630.****MILK AND MILK PRODUCTS.****Damages.**

Unfair trade practices.

Violations of provisions, §4-75-809.

**Definitions.**

Unfair trade practices, §4-75-802.

Equivalent competitive prices, §4-75-805.

**Dumping.**

Unfair trade practices.

Sales at less than equivalent competitive price, §4-75-805.

**Injunctions.**

Unfair trade practices.

Violations of provisions, §4-75-809.

**Monopolies and restraint of trade.**

Discrimination.

Buying milk, cream, butter, butter fat, poultry, eggs, grain or cottonseed, §4-75-502.

**MILK AND MILK PRODUCTS**

—Cont'd

**Monopolies and restraint of trade**

—Cont'd

Unfair trade practices, §§4-75-801 to 4-75-809.

**Penalties.**

Unfair trade practices, §§4-75-804, 4-75-807.

**Remedies.**

Unfair trade practices, §4-75-809.

**State institutions.**

Unfair trade practices.

Exceptions, §4-75-803.

**Treble damages.**

Unfair trade practices, §4-75-809.

**Unfair trade practices.**

Costs.

Defined, §4-75-802.

Rebates, refunds, etc., considered as costs, §4-75-806.

Damages.

Violations of provisions, §4-75-809.

Definitions, §4-75-802.

Equivalent competitive prices, §4-75-805.

Dumping.

Sales at less than equivalent competitive price, §4-75-805.

Equipment.

Furnishing equipment free or at less than cost.

Prohibited, §4-75-808.

Exceptions, §4-75-808.

Exceptions.

Certain institutions, §4-75-803.

Fresh dairy products.

Limiting quantity of purchase.

Prohibited, §4-75-807.

Injunctions.

Violations of provisions, §4-75-809.

Legislative intent, §4-75-801.

Limiting quantity of purchase of fresh dairy products.

Prohibited, §4-75-807.

Penalties.

Fresh dairy products.

Limiting quantity of purchase, §4-75-807.

Violations of provisions, §4-75-804.

Purpose of provisions, §4-75-801.

Rebates, refunds, etc., considered as costs, §4-75-806.

Sales.

Sales at less than equivalent competitive prices.

Prohibited, §4-75-805.

**MILK AND MILK PRODUCTS**

—Cont'd

**Unfair trade practices —Cont'd**

Violations.

Fresh dairy products.

Limiting quantity of purchase,  
§4-75-807.

Violations of provisions.

Damages, §4-75-809.

Injunctions, §4-75-809.

Penalties, §4-75-804.

**Violations.**

Unfair trade practices.

Fresh dairy products.

Limiting quantity of purchase,  
§4-75-807.**MINES AND MINERALS.****Contracts.**

Sales.

Applicability of sales chapter of  
commercial code, §4-2-107.**Secured transactions.**

Law governing perfection and priority.

Location of minehead, §4-9-301.

**MIRROR IMAGE RULE.****Contracts for sale of goods.**

Variation of rule, §4-2-207.

**MODEL REGISTERED AGENTS**

ACT, §§4-20-101 to 4-20-118.

**MONEY.****Accounts and accounting.**Monetary units of United States,  
§4-17-101.**Currency.**Unlawful creation and circulation,  
§§4-17-102, 4-17-103.**MONOPOLIES AND RESTRAINT OF  
TRADE.****Actions.**Automobile dealer's anti-coercion act.  
Double damages actions of injured  
parties, §4-75-412.

By attorney general, §4-75-315.

Statute of limitations, §4-75-320.

Unfair practices, §4-75-217.

Unfair practices, §4-75-212.

Venue, §4-75-319.

Unfair practices, §4-75-216.

Discrimination.

Price of manufactured items, coal oil  
or dressed beef.

Recovery of forfeitures, §4-75-501.

Interstate or foreign commerce.

Actions not barred because it affects,  
§4-75-318.**MONOPOLIES AND RESTRAINT OF  
TRADE —Cont'd****Actions —Cont'd**Precedence of actions brought under  
subchapter, §4-75-308.

Unfair practices.

Interstate or foreign commerce.

Action not barred because it  
affects, §4-75-215.**Agriculture.**

Discrimination.

Buying milk, cream, butter,  
butterfat, poultry, eggs, grain or  
cotton seed, §4-75-502.**Antitrust enforcement account.**Established in office of attorney  
general, §4-75-317.

Unfair practices.

Established in office of attorney  
general, §4-75-214.**Attorney general.**

Actions and settlements by, §4-75-315.

Statute of limitations, §4-75-320.

Venue, §4-75-319.

Antitrust enforcement account.

Established in office, §4-75-317.

Unfair practices.

Actions by, §4-75-212.

Statute of limitations, §4-75-217.

Venue, §4-75-216.

Antitrust enforcement account.

Established in office of attorney  
general, §4-75-214.**Automobile dealer's anti-coercion  
act.**

Actions by injured parties, §4-75-412.

Citation of subchapter, §4-75-401.

Construction and interpretation.

Cumulative nature of subchapter,  
§4-75-403.

Contracts violating subchapter.

Void, §4-75-407.

Cumulative nature of subchapter,  
§4-75-403.

Definitions, §4-75-402.

Discrimination.

Unlawful discrimination, §4-75-411.

Dissolution for violations, §4-75-405.

Double damages.

Actions by injured parties,  
§4-75-412.

Exclusive financing agreements.

Prohibition, §4-75-408.

Threats as prima facie evidence,  
§4-75-409.Threats presumed made at direction  
of manufacturer or distributor,  
§4-75-410.

**MONOPOLIES AND RESTRAINT OF TRADE —Cont'd****Automobile dealer's anti-coercion act —Cont'd**

- Financing, purchase or sale.
- Exclusive financing agreements.
- Prohibition, §4-75-408.
- Threats as prima facie evidence, §4-75-409.
- Threats presumed made at direction of manufacturer or distributor, §4-75-410.

**Foreign corporations.**

- Prohibition from doing business upon violation of subchapter, §4-75-406.

**Forfeiture of charter rights for violation, §4-75-405.****Penalties.**

- Persons subject to penalties, §4-75-404.
- Separate offense for each day's violation, §4-75-404.

**Persons.**

- Defined, §4-75-402.

**Purchases.**

- Defined, §4-75-402.

**Sales.**

- Defined, §4-75-402.

**Subsidies.**

- Unlawful subsidies, §4-75-411.

**Threats.**

- Exclusive financing agreements.
- Evidentiary effect of threats, §4-75-409.

**Title of subchapter, §4-75-401.****Unlawful subsidies or discrimination.**

- Prohibited, §4-75-411.

**Wholesale distribution.**

- Defined, §4-75-402.

**Civil penalties.**

- Actions by attorney general, §4-75-315.
- Unfair practices, §4-75-212.

**Coercion.**

- Automobile dealers, §§4-75-401 to 4-75-412.

**Commerce.**

- Lawful commerce excepted from prohibition, §4-75-303.

**Conflict of laws.**

- Unfair practices act.
- Provisions controlling, §4-75-211.

**Consent decrees.**

- In lieu of action by attorney general, §4-75-315.
- Unfair practices.
- Acceptance by attorney general in lieu of action, §4-75-212.

**MONOPOLIES AND RESTRAINT OF TRADE —Cont'd****Conspiracy.**

- Fixing prices or quantity of products.
- Prohibited, §4-75-309.
- Lawful commerce excepted, §4-75-303.

**Construction and interpretation.**

- Automobile dealer's anti-coercion act.
- Cumulative nature of subchapter, §4-75-403.
- Unfair practices.
- Liberal construction of subchapter, §4-75-203.

**Contracts.**

- Automobile dealer's anti-coercion act.
- Voidness of contracts violating subchapter, §4-75-407.
- Unfair practices.
- No recovery on contract violating act, §4-75-206.

**Corporations.**

- Charters.
- Unfair practices.
- Forfeiture of charter on third violation, §4-75-205.
- Officers, directors, agents and employees.
- Unfair practices.
- Proof of unlawful intent, §§4-75-209, 4-75-210.
- Unfair practices.
- Charters.
- Forfeiture, §4-75-205.
- Officers, directors, agents and employees, §§4-75-209, 4-75-210.

**Damages.**

- Actions by attorney general, §4-75-315.
- Automobile dealer's anti-coercion act.
- Double damages.
- Actions by injured parties for double damages, §4-75-412.
- Discrimination.
- News furnishing.
- Recovery by those discriminated against, §4-75-503.

**Unfair practices.**

- Action by attorney general, §4-75-212.
- Violations of provisions, §4-75-211.

**Declaratory judgments.**

- Action by attorney general.
- Unfair practices, §4-75-212.
- Actions by attorney general, §4-75-315.

**Definitions, §4-75-301.**

- Automobile dealer's anti-coercion act, §4-75-402.
- Person, §4-75-316.
- Unfair practices, §4-75-213.

## **MONOPOLIES AND RESTRAINT OF TRADE —Cont'd**

### **Discrimination.**

#### **Actions.**

Price of manufactured products, coal oil or dressed beef.

Recovery of forfeitures, §4-75-501.

Automobile dealer's anti-coercion act.

Unlawful subsidies or discrimination, §4-75-411.

Buying milk, cream, butter, butterfat, poultry, eggs, grain or cotton seed.

#### **Injunctions.**

Suit by attorney general to enjoin continuance of business, §4-75-502.

#### **Penalties.**

Violations of provisions, §4-75-502.

Prohibited acts, §4-75-502.

#### **Damages.**

##### **News furnishing.**

Recovery by those discriminated against, §4-75-503.

#### **Injunctions.**

Buying milk, cream, butter, butterfat, poultry, eggs, grain or cotton seed.

Suit by attorney general to enjoin continuance of business, §4-75-502.

#### **Joinder.**

Price of manufactured products, coal oil or dressed beef.

Actions for recovery of forfeitures. Joinder of offenses, §4-75-501.

#### **News furnishing.**

##### **Damages.**

Recovery by those discriminated against, §4-75-503.

##### **Penalties.**

Transmission of prohibited news, §4-75-503.

Violations of provisions, §4-75-503.

##### **Uniform rates.**

Required, §4-75-503.

#### **Penalties.**

Buying milk, cream, butter, butterfat, poultry, eggs, grain or cotton seed.

Violations of provisions, §4-75-502.

News furnishing, §4-75-503.

#### **Price discrimination.**

Commodity purchases, §4-75-502.

Manufactured products, coal oil or dressed beef, §4-75-501.

#### **News.**

Furnishing or transmitting, §4-75-503.

## **MONOPOLIES AND RESTRAINT OF TRADE —Cont'd**

### **Discrimination —Cont'd**

Price of manufactured products, coal oil or dressed beef.

#### **Actions.**

Recovery of forfeitures, §4-75-501.

Joinder of offenses, §4-75-501.

Service of process, §4-75-501.

Venue, §4-75-501.

Prohibited acts, §4-75-501.

Forfeitures for, §4-75-501.

#### **Service of process.**

Price of manufactured products, coal oil or dressed beef.

Actions for recovery of forfeitures, §4-75-501.

#### **Venue.**

Price of manufactured products, coal oil or dressed beef.

Actions for recovery of forfeitures, §4-75-501.

### **Dissolution of monopolies.**

Automobile dealer's anti-coercion act.

Forfeiture of charter rights and dissolution for violations, §4-75-405.

### **Driving out competition.**

Creation of monopoly by.

Penalty, §4-75-310.

### **Evidence.**

Automobile dealer's anti-coercion act.

Exclusive financing agreements.

Threats as prima facie evidence, §4-75-409.

### **Exclusive financing agreements.**

Automobile dealer's anti-coercion act, §§4-75-408 to 4-75-410.

### **Foreign corporations.**

Automobile dealer's anti-coercion act.

Prohibition on doing business upon violation of subchapter, §4-75-406.

### **Forfeitures.**

Automobile dealer's anti-coercion act.

Charter rights may be forfeited for violation of provisions, §4-75-405.

### **Injunctions.**

Actions by attorney general, §4-75-315.

#### **Unfair practices.**

Action by attorney general, §4-75-212.

Violations of provisions, §4-75-211.

### **Interstate or foreign commerce.**

Action not barred because it affects, §4-75-318.

Unfair practices, §4-75-215.

**MONOPOLIES AND RESTRAINT OF TRADE —Cont'd****Joinder.**

Discrimination.

Price of manufactured products, coal oil or dressed beef.

Actions for recovery of forfeitures.

Joinder of offenses, §4-75-501.

**Milk and milk products.**

Discrimination.

Buying milk, cream, butter, butterfat, poultry, eggs, grain or cotton seed, §4-75-502.

Unfair trade practices, §§4-75-801 to 4-75-809.

**Motion pictures.**

Fair practices, §§4-75-901 to 4-75-906.

**News media.**

Discrimination.

News furnishing, §4-75-503.

**Penalties.**

Automobile dealer's anti-coercion act.

Persons subject to penalties, §4-75-404.

Discrimination.

Buying milk, cream, butter, butterfat, poultry, eggs, grain or cotton seed.

Violations of provisions, §4-75-502.

News furnishing, §4-75-503.

Formation of monopoly.

Creation of monopoly by driving out competition, §4-75-310.

Prohibition on monopoly, §4-75-302.

Unfair practices.

Violations of act, §4-75-204.

**Person defined, §4-75-316.****Presumptions.**

Automobile dealer's anti-coercion act.

Exclusive financing agreements.

Threats presumed made at direction of manufacturer or distributor, §4-75-410.

**Price discrimination.**

Commodity purchases, §4-75-502.

Manufactured products, coal oil or dressed beef, §4-75-501.

News.

Furnishing or transmitting, §4-75-503.

**Price fixing.**

Conspiracies or combinations to fix prices or quantity of products.

Prohibited, §4-75-309.

**Prohibited, §4-75-302.****Rebates.**

Unfair practices.

Secret payment prohibited, §4-75-208.

**MONOPOLIES AND RESTRAINT OF TRADE —Cont'd****Rebates —Cont'd**

Unfair practices —Cont'd

Special rebates prohibited, §4-75-207.

**Restitution.**

Actions by attorney general, §4-75-315.

Unfair practices, §4-75-212.

**Sales.**

Unfair practices.

Sale at less than cost or with intent to injure competitors, §4-75-209.

**Service of process.**

Discrimination.

Price of manufactured products, coal oil or dressed beef.

Actions for recovery of forfeitures, §4-75-501.

**Statute of limitations.**

Actions by attorney general, §4-75-320.

Unfair practices, §4-75-217.

**Threats.**

Automobile dealer's anti-coercion act.

Exclusive financing agreements.

Evidentiary effect of threats, §4-75-409.

Presumption that threats made at direction of manufacturer or distributor, §4-75-410.

**Unfair practices.**

Action by attorney general, §4-75-212.

Statute of limitations, §4-75-217.

Venue, §4-75-216.

Antitrust enforcement account.

Established in office of attorney general, §4-75-214.

Citation of act.

Short title, §4-75-201.

Civil penalties.

Action by attorney general, §4-75-212.

Conflict of laws.

Provisions of act controlling, §4-75-211.

Consent decree.

Acceptance by attorney general in lieu of action, §4-75-212.

Construction and interpretation, §4-75-203.

Contracts.

No recovery on contract violating act, §4-75-206.

Corporations.

Charter.

Forfeiture for third violation, §4-75-205.

**MONOPOLIES AND RESTRAINT OF TRADE —Cont'd****Unfair practices —Cont'd**

## Corporations —Cont'd

Officers, directors and agents.

Proof of unlawful intent,  
§§4-75-209, 4-75-210.Responsibility for violations,  
§4-75-210.

Cumulative nature of act, §4-75-211.

Damages.

Violations of provisions, §4-75-211.

Damages or restitution.

Action by attorney general,  
§4-75-212.

Declaratory judgment.

Action by attorney general,  
§4-75-212.

Definitions.

Person, §4-75-213.

Discrimination.

Prohibited acts, §4-75-207.

Injunctions.

Action by attorney general,  
§4-75-212.

Violations of provisions, §4-75-211.

Interstate or foreign commerce.

Action not barred because it affects,  
§4-75-215.

Legislative intent, §4-75-202.

Misdemeanors.

Sale at less than cost or with intent  
to injure competitors, §4-75-209.Secret payments or allowance of  
rebates, refunds, commissions or  
unearned discounts, §4-75-208.Violations of provisions generally,  
§4-75-204.

Penalties.

Violations of provisions, §4-75-204.

Person defined, §4-75-213.

Price discrimination, §4-75-207.

Prohibited acts, §§4-75-207 to  
4-75-209.

Purpose of provisions, §4-75-202.

Rebates.

Secret payment, §4-75-208.

Special rebates prohibited,  
§4-75-207.Sale at less than cost or with intent to  
injure competitors, §4-75-209.Establishing cost of article or  
product, §4-75-209.

Exceptions, §4-75-209.

Proof of unlawful intent, §4-75-209.

Secret payments or allowances of  
rebates, refunds, commissions or  
unearned discounts, §4-75-208.**MONOPOLIES AND RESTRAINT OF TRADE —Cont'd****Unfair practices —Cont'd**

Severability of provisions, §4-75-211.

Statute of limitations.

Action by attorney general,  
§4-75-217.

Title of act.

Short title, §4-75-201.

Unfair cigarette sales, §§4-75-701 to  
4-75-714.Venue of actions by attorney general,  
§4-75-216.

Witnesses, §4-75-211.

**Venue.**

Actions by attorney general, §4-75-319.

Discrimination.

Price of manufactured products, coal  
oil or dressed beef.Actions for recovery of forfeiture,  
§4-75-501.

Unfair practices.

Actions by attorney general,  
§4-75-216.**Witnesses.**

Unfair practices, §4-75-211.

**MORTGAGES AND DEEDS OF TRUST.****Nonprofit corporations.**

Powers of corporation, §4-28-209.

**Secured transactions.**

Generally, §§4-9-101 to 4-9-709.

Record as financing statement,  
§4-9-502.**MOTION PICTURES.****Definitions.**

Fair practices, §4-75-902.

**Fair practices.**

Bidding.

Blind bidding.

Defined, §4-75-902.

Invitation to bid, §4-75-906.

Prohibited, §4-75-905.

Definition of "bid," §4-75-902.

Invitation to bid, §4-75-906.

Procedures, §4-75-906.

Definitions, §4-75-902.

Injunctions.

Violations of provisions, §4-75-904.

Legislative declaration.

Purpose of act, §4-75-901.

Penalties.

Violations of provisions, §4-75-903.

Purpose of act, §4-75-901.

Violations.

Violations of provisions, §4-75-903.

**MOTION PICTURES —Cont'd****Fair practices —Cont'd**

Violations of provisions.

Injunctions, §4-75-904.

**Injunctions.**

Fair practices.

Violations of provisions, §4-75-904.

**Penalties.**

Fair practices.

Violations of provisions, §4-75-903.

**Violations.**

Fair practices.

Violations of provisions, §4-75-903.

**MOTOR CARRIERS.****Documents of title.**

General provisions, §§4-7-101 to 4-7-704.

**MOTOR FUELS.****Quality specifications for engine fuels, petroleum products and automotive lubricants,**  
§§4-108-201 to 4-108-213.**Weights and measures.**

Pumps.

Testing, §4-18-344.

**MOTOR FUEL TAX.****Contract provision requiring reimbursement of federal excise taxes.**

Optional manner of reimbursement.

Exercise by reimbursing party,  
notice, §4-56-103.**MOTOR VEHICLE ACCIDENTS.****Aftermarket crash parts, §§4-90-301 to 4-90-307.****MOTOR VEHICLE DEALERS.****Aftermarket crash parts, §§4-90-301 to 4-90-307.****Automotive parts dealers.**

Aftermarket crash parts, §§4-90-301 to 4-90-307.

**Coercion.**Automobile dealer's anti-coercion act,  
§§4-75-401 to 4-75-412.**Financing, purchase or sale.**Automobile dealer's anti-coercion act,  
§§4-75-401 to 4-75-412.**Monopolies and restraint of trade.**Automobile dealer's anti-coercion act,  
§§4-75-401 to 4-75-412.**Parts dealers.**

Aftermarket crash parts, §§4-90-301 to 4-90-307.

**Sales.**

Financing, purchase or sale.

Automobile dealer's anti-coercion  
act, §§4-75-401 to 4-75-412.**MOTOR VEHICLE INSURANCE.****Rental vehicles.**

Costs of rental.

Lemon law reimbursement,  
§4-90-408.**Service contracts, §§4-90-501 to 4-90-512.**

Applicability, §4-90-503.

Disclosures, §4-90-506.

Enforcement, §4-90-510.

Exclusive governance of provisions,  
§4-90-504.

Form of contracts, §4-90-512.

Holder.

Defined, §4-90-502.

Incidental benefits, §4-90-508.

Mandatory insurance, §4-90-505.

Mechanical breakdown insurance.

Defined, §4-90-502.

Motor vehicle.

Defined, §4-90-502.

Motor vehicle service contract.

Defined, §4-90-502.

Motor vehicle service contract  
provider.

Defined, §4-90-502.

Motor vehicle service contract  
reimbursement insurance policy.

Defined, §4-90-502.

Provider.

Defined, §4-90-502.

Refunds, §4-90-507.

Rules and regulations, §4-90-509.

Service contract.

Defined, §4-90-502.

Service contract holder.

Defined, §4-90-502.

Title, §4-90-501.

Unfair trade practices, §4-90-511.

**MOTOR VEHICLES.****Aftermarket crash parts, §§4-90-301 to 4-90-307.****Arbitration clauses in sales contracts, §4-75-413.****Contracts.**Arbitration and forum selection  
clauses in sales contracts,  
§4-75-413.

Service contracts, §§4-90-501 to 4-90-512.

**Forum selection clauses in sales contracts, §4-75-413.****Investigations.**

Service contracts, §4-90-509.

**Leases.**

Prohibited transfers, §4-100-103.

Definitions, §4-100-101.

**MOTOR VEHICLES —Cont'd****Leases —Cont'd**

Prohibited transfers —Cont'd  
Violations, §4-100-102.

**Leases, UCC.**

Terminal rental adjustment clauses,  
§4-2A-110.

**Lemon law**, §§4-90-401 to 4-90-417.

**Manufacturers.**

Aftermarket crash parts, §§4-90-301 to  
4-90-307.

**New motor vehicles.**

Quality assurance, §§4-90-401 to  
4-90-417.

**Odometer regulations**, §§4-90-201 to  
4-90-207.

**Quality assurance.**

New vehicles, §§4-90-401 to 4-90-417.

**Repairs.**

Aftermarket crash parts, §§4-90-301 to  
4-90-307.

Odometer regulations, §§4-90-201 to  
4-90-207.

Repair estimates, §4-90-305.

**Sales.**

Arbitration and forum selection  
clauses in contracts, §4-75-413.

Resale of returned nonconforming  
vehicle.

Lemon law, §4-90-412.

**Service contracts**, §§4-90-501 to  
4-90-512.

**Transfers.**

Definitions, §4-100-101.

Prohibited practices, §4-100-103.

Violations, §4-100-102.

**Warranties.**

Lemon law, §§4-90-401 to 4-90-417.

**MUNICIPALITIES.****Charitable contributions,  
solicitation.**

Ordinances regulating, §4-28-414.

**Solicitations.**

Charitable contributions.

Ordinances regulating solicitation,  
§4-28-414.

**MUSIC.**

**Tickets to live events, restrictions  
on Internet sales**, §4-70-103.

**MUTUAL BENEFIT  
CORPORATIONS.****Nonprofit corporations (1993).**

Election to be governed by nonprofit  
corporation law, §4-33-1707.

Purchase of memberships, §4-33-1302.

**N****NAMES.**

**Business under assumed name**,  
§§4-70-201 to 4-70-206.

**Cooperative associations.**

Title.

Corporate title, §4-30-106.

**Corporations.**

Corporate name.

Domestic corporations, §§4-26-401,  
4-27-401.

Foreign corporations, §§4-26-401,  
4-27-401, 4-27-1506.

Fictitious names.

Notice to registrant regarding use,  
§4-27-406.

Use, §§4-26-405, 4-27-404.

Injunction against use of unlawful  
name, §§4-26-406, 4-27-405.

Registered name, §§4-26-403, 4-27-403.

Notice to registrant regarding use,  
§4-27-406.

Renewal, §§4-26-404, 4-27-403.

Reserved name, §§4-26-402, 4-27-402.

Notice to registrant regarding use,  
§4-27-406.

**Dental corporations.**

Corporate name, §4-29-406.

**Limited liability companies,  
§4-32-103.**

Fictitious names, conducting business  
under, §4-32-108.

Foreign limited liability companies.

Registered name, §4-32-109.

Requirements for registration,  
§4-32-1004.

Reservation, §4-32-104.

**Limited liability partnerships,  
§4-46-1002.****Limited partnerships, §4-47-108.**

Foreign limited partnerships,  
§4-47-905.

Reservation of name, §4-47-109.

**Medical corporations.**

Corporate name, §4-29-306.

**Nonprofit corporations (1993).**

Corporate name, §4-33-401.

Foreign corporations, §4-33-1506.

Registered name, §4-33-403.

Reserved name, §4-33-402.

**Partnerships.**

Fictitious name, conducting business  
under, §4-42-707.

Limited partnerships, §4-47-108.

Assumed name.

Applicability of provisions,  
§4-70-201.

**NAMES** —Cont'd**Partnerships** —Cont'd

Limited partnerships —Cont'd

Foreign limited partnerships,  
§4-47-905.

Reservation of name, §4-47-109.

**Professional corporations.**

Corporate name, §4-29-207.

**Professional service limited liability companies, §4-32-103.****Service contracts.**

Prohibited acts by provider,  
§4-114-107.

**Water authorities, §§4-35-201, 4-35-202.****NATURAL RESOURCES COMMISSION.****Water authorities, §§4-35-101 to 4-35-306.****NEGLIGENCE.****Commercial code.**

Bank deposits and collections.

Unauthorized signature or  
alteration, §4-4-406.

Negotiable instruments.

Forged signature or alteration of  
instruments, §4-3-406.

**Comparative fault.**

Bank deposits and collections.

Unauthorized signature or  
alteration, §4-4-406.

Negotiable instruments.

Forged signature or alteration of  
instrument, §4-3-406.

**Comparative negligence.**

Bank deposits and collections.

Unauthorized signature or  
alteration, customer's duty to  
report, §4-4-406.

Negotiable instruments.

Forged signature or alteration of  
instrument, §4-3-406.

**Contributory negligence.**

Bank deposits and collections.

Unauthorized signature or  
alteration, §4-4-406.

Negotiable instruments.

Forged signature or alteration of  
instrument, §4-3-406.

**Negotiable instruments.**

Forged signature or alteration of  
instrument.

Liability for negligence contributing  
to, §4-3-406.

**NEGOTIABLE INSTRUMENTS, §§4-3-101 to 4-3-605.****Acceptor.**

Defined, §4-3-103.

**NEGOTIABLE INSTRUMENTS**

—Cont'd

**Acceptor** —Cont'd

Obligation.

Liability, §4-3-413.

**Accommodation party.**

Instrument signed for accommodation.

Liability, §4-3-419.

**Accord and satisfaction.**

By use of instrument, §4-3-311.

**Alteration.**

Defined, §4-3-407.

Liability for negligence contributing to,  
§4-3-406.

**Anomalous endorsement.**

Defined, §4-3-205.

**Applicability of article, §4-3-102.****"As originally drawn" defined, §4-3-413.****Bills of lading, §4-7-104.****Blank endorsement.**

Defined, §4-3-205.

**Breach of fiduciary duty.**

Notice, §4-3-307.

**Burden of proof.**

Incomplete instrument, §4-3-115.

**Cashier's check.**

Defined, §4-3-104.

Effect on obligation for which taken,  
§4-3-310.

Obligation of issuer.

Liability, §4-3-412.

Refusal to pay.

Liability, §4-3-411.

**Certificate of deposit.**

Defined, §4-3-104.

**Certified check.**

Acceptance.

Liability, §4-3-409.

Defined, §4-3-409.

Effect on obligation for which taken,  
§4-3-310.

Refusal to pay.

Liability, §4-3-411.

**Checks.**

Dishonor.

Rules governing, §4-3-502.

Effect on obligation for which taken,  
§4-3-310.

Lost, stolen or destroyed cashier's  
check, teller's check or certified  
check, §4-3-312.

Traveler's check.

Defined, §4-3-104.

**Citation of title, §4-3-101.****Claims.**

Person taking instrument, §4-3-306.

Recoupment, §4-3-305.

**NEGOTIABLE INSTRUMENTS**

—Cont'd

**Consideration.**

Defined, §4-3-303.

**Construction of article, §4-3-102.****Consumer transaction.**Defenses and claims in recoupment,  
§4-3-305.

Defined, §4-3-103.

**Contradictory terms of instrument,  
§4-3-114.****Contribution, §4-3-116.****Conversion of instrument.**

Liability, §4-3-420.

**Date of instrument, §4-3-113.****Defenses.**

Recoupment, §4-3-305.

**Definitions, §§4-3-103, 4-3-104.**

Index of definitions, §4-3-103.

**Destroyed instrument, §4-3-309.**Cashier's check, teller's check or  
certified check, §4-3-312.**Discharge.**

Cancellation, §4-3-604.

Effect, §4-3-601.

Renunciation, §4-3-604.

**Dishonor.**

Evidence of dishonor, §4-3-505.

Notice of dishonor.

Evidence, §4-3-505.

Excuse presentment, §4-3-504.

How given, §4-3-503.

Protest.

Defined, §4-3-505.

Rules governing, §4-3-502.

Presumption of dishonor, §4-3-505.

Protest.

Defined, §4-3-505.

Rules governing, §4-3-502.

Special provisions, §4-3-502.

**Documents of title, §4-7-104.****Drafts.**

Acceptance varying draft.

Liability, §4-3-410.

Defined, §4-3-104.

Dishonor.

Rules governing, §4-3-502.

Unaccepted draft.

Drawee liability on, §4-3-408.

**Drawee.**

Defined, §4-3-103.

Liability on unaccepted draft,  
§4-3-408.**Drawer.**

Defined, §4-3-103.

Obligation.

Liability, §4-3-414.

**NEGOTIABLE INSTRUMENTS**

—Cont'd

**Employee.**

Defined, §4-3-405.

**Endorsement.**

Anomalous endorsement.

Defined, §4-3-205.

Blank endorsement.

Defined, §4-3-205.

Defined, §4-3-204.

Fraudulent endorsement.

By employee.

Employer's responsibility,  
§4-3-405.

Defined, §4-3-405.

Restrictive endorsement.

Special provisions, §4-3-206.

Special endorsement.

Defined, §4-3-205.

Without recourse.

Obligation of endorser, §4-3-415.

**Endorser.**

Defined, §4-3-205.

Obligation.

Liability, §4-3-415.

**Erroneous acceptance, §4-3-418.****Evidence.**

Notice of dishonor, §4-3-505.

Parol evidence.

Other agreements affecting  
instrument, §4-3-117.**Excuse presentment.**

Notice of dishonor, §4-3-504.

**Fictitious payees.**

Liability, §4-3-404.

**Fiduciaries.**

Breach of fiduciary duty.

Notice of, §4-3-307.

Defined, §4-3-307.

**Foreign money.**

Instrument payable in, §4-3-107.

**Fraud.**

Employee fraudulent endorsement.

Employer's responsibility for,  
§4-3-405.

Fictitious payees, §4-3-404.

Forged signature or alteration of  
instrument.Liability for negligence contributing  
to, §4-3-406.

Fraudulent endorsement.

Defined, §4-3-405.

Imposters, §4-3-405.

Unauthorized signature.

Liability, §4-3-403.

**Good faith.**

Defined, §4-3-103.

**NEGOTIABLE INSTRUMENTS**

—Cont'd

**Holder in due course.**

Defined, §4-3-302.

Proof of signatures and status as,  
§4-3-308.

Signatures and status.

Proof of, §4-3-308.

Special provisions, §4-3-302.

**Identification of person to whom  
instrument payable, §4-3-110.****Imposters.**

Fraud, §4-3-405.

Liability, §4-3-404.

**Incomplete instrument.**

Defined, §4-3-115.

**Instruments.**

Accord and satisfaction.

By use on instrument, §4-3-311.

Alteration of instrument.

Liability for negligence contributing  
to, §4-3-406.

Claims, §4-3-306.

Contradictory terms of instrument,  
§4-3-114.

Date of, §4-3-113.

Effect on obligation for which taken,  
§4-3-310.Identification of person to whom  
payable, §4-3-110.

Incomplete instrument.

Defined, §4-3-115.

Issue of, §4-3-105.

Lost, destroyed or stolen, §4-3-309.

Cashier's check, teller's check or  
certified check, §4-3-312.Other agreements affecting  
instrument, §4-3-117.

Overdue instrument, §4-3-304.

Payable in foreign money, §4-3-107.

Person entitled to enforce.

Defined, §4-3-301.

Place of payment, §4-3-111.

Reacquisition, §4-3-207.

Stolen instrument.

Payment, §4-3-602.

Transfer of instrument.

Value and consideration, §4-3-303.

**Interest.**Instrument not payable with interest,  
§4-3-112.

Interest-bearing instrument.

Date on which payable, §4-3-112.

**Issue.**

Defined, §4-3-105.

**Issuer.**

Defined, §4-3-105.

**Joint and several liability, §4-3-116.****NEGOTIABLE INSTRUMENTS**

—Cont'd

**Limitation of actions, §4-3-118.****Lost instruments, §4-3-309.**Cashier's check, teller's check or  
certified check, §4-3-312.**Maker.**

Defined, §4-3-103.

**Mistake.**Payment or acceptance by mistake,  
§4-3-418.**Negligence.**Forged signature or alteration of  
instrument.Liability for negligence contributing  
to, §4-3-406.**Negotiation.**

Defined, §4-3-201.

Rescission, §4-3-202.

Transfer of instrument, §4-3-201.

Rights acquired by transfer,  
§4-3-203.**Note.**

Defined, §4-3-104.

Dishonor.

Rules governing, §4-3-502.

Effect on obligation for which taken,  
§4-3-310.

Obligation of issuer.

Liability, §4-3-412.

**Notice.**

Third party.

Written notice.

Right to defend action, §4-3-119.

**Obligated bank.**Wrongful refusal to pay negotiable  
instrument.

Liability, §4-3-411.

**Order.**

Defined, §4-3-103.

Payable at definite time.

Defined, §4-3-108.

Payable on demand.

Defined, §4-3-108.

Payable to bearer or to order.

Defined, §4-3-109.

Unconditional order.

Defined, §4-3-106.

**Ordinary care.**

Defined, §4-3-103.

**Overdue instrument, §4-3-304.****Parties.**

Defined, §4-3-103.

**"Payable at a definite time" defined,**  
§4-3-108.**"Payable on demand" defined,**  
§4-3-108.**Payment by mistake, §4-3-418.**

**NEGOTIABLE INSTRUMENTS**

—Cont'd

**Payment of obligation**, §4-3-602.

Tender of payment, §4-3-603.

**Place of payment of instrument**, §4-3-111.**Presentment.**

Defined, §4-3-501.

Excuse presentment, §4-3-504.

Notice of presentment, §4-3-504.

Rules governing dishonor, §4-3-501.

Warranties, §4-3-417.

**Presumptions.**

Notice of dishonor, §4-3-505.

**Promise.**

Defined, §4-3-103.

Payable at definite time.

Defined, §4-3-108.

Payable on demand.

Defined, §4-3-108.

Payable to bearer or to order.

Defined, §4-3-109.

Unconditional promise.

Defined, §4-3-106.

**Protest.**

Defined, §4-3-505.

**Prove.**

Defined, §4-3-103.

**Reacquisition of instrument**, §4-3-207.**Recoupment.**

Defenses and claims in recoupment, §4-3-305.

**Remitter.**

Defined, §4-3-103.

**Represented person.**

Defined, §4-3-307.

**Responsibility.**

Defined, §4-3-405.

**Restrictive endorsement.**

Special provisions, §4-3-206.

**Scope of article**, §4-3-102.**Secondary obligors.**

Defined, §4-3-103.

Discharge, §4-3-605.

**Secured transactions.**

Chattel paper defined, §4-9-102.

Electronic chattel paper.

Control, §4-9-105.

Perfection by control, §4-9-314.

Defined, §4-9-102.

Duties of secured party having control of collateral, §4-9-208.

Perfection by control, §4-9-314.

Generally, §§4-9-101 to 4-9-709.

Perfection of security interests in, §4-9-312.

Priority of purchaser, §4-9-330.

**NEGOTIABLE INSTRUMENTS**

—Cont'd

**Secured transactions** —Cont'd

Purchaser of chattel paper or instrument.

Priority, §4-9-330.

**Short title**, §4-3-101.**Signatures.**

Forged signatures.

Liability for negligence contributing to, §4-3-406.

Person liable on instrument, §4-3-401.

Representative signature.

Liability, §4-3-402.

Unauthorized signature.

Liability, §4-3-403.

**Special endorsement.**

Defined, §4-3-205.

**Statute of limitations**, §4-3-118.**Stolen instrument**, §4-3-309.

Cashier's check, teller's check or certified check, §4-3-312.

**Telemarketers submitting for payment.**

Express consent of consumer required, §4-99-203.

**Teller's check.**

Defined, §4-3-104.

Effect on obligation for which taken, §4-3-310.

Refusal to pay.

Liability, §4-3-411.

**Third parties.**

Notice of right to defend action, §4-3-119.

**Title of article**, §4-3-101.**Transfer of instrument.**

Bank deposits and collections.

Collection by depository and collecting banks.

Transfer warranties, §4-4-207.

Negotiation, §4-3-201.

Reacquisition, §4-3-207.

Rights acquired, §4-3-203.

Value and consideration, §4-3-303.

Warranties, §4-3-416.

**Traveler's check.**

Defined, §4-3-104.

**Unauthorized signature.**

Liability, §4-3-403.

**Warranties.**

Presentment warranties, §4-3-417.

Transfer warranties, §4-3-416.

**Water authorities.**

Bond issues, §4-35-301.

**NEW HOME WARRANTIES.****Implied warranties.**

Fitness for particular purpose, §4-2-315.

**NEWS MEDIA.****Monopolies and restraint of trade.**

Discrimination.

News furnishing, §4-75-503.

**NEWSPAPERS.****Corporations.**

Dissolution.

Notice of unknown claims,  
§4-27-1407.**NO CALL LISTS, §§4-99-401 to  
4-99-408.****Applicability of provision, §4-99-406.****Arkansas consumer telephone  
privacy act.**

Short title, §4-99-401.

**Deceptive trade practice.**

Violations, §4-99-407.

**Definition, §4-99-403.****Enforcement, §4-99-407.****Findings, §4-99-402.****Intent, §4-99-402.****Persons exempt, §4-99-406.****Short title.**Arkansas consumer telephone privacy  
act, §4-99-401.**Statewide database.**Attorney general to establish,  
§4-99-404.Calling number included in database,  
prohibition, §4-99-405.Calling number without first accessing  
database, §4-99-405.

Listing charge, §§4-99-404, 4-99-408.

**NONDELIVERY.****Commercial code.**

Leases.

Damages for nondelivery of goods,  
§4-2A-519.

Sale of goods.

Buyer's damages for nondelivery,  
§4-2-713.**NONPROFIT CORPORATIONS  
(1987).****Accounts and accounting.**

Books and accounting records.

Keeping, §4-28-218.

**Actions.**

Power to sue and be sued, §4-28-209.

**Admission of foreign corporations,  
§4-28-221.****Agents.**

Service of process.

Secretary of state as registered  
agent, §4-28-214.**NONPROFIT CORPORATIONS**

(1987) —Cont'd

**Amendments.**

Articles of incorporation, §4-28-206.

Amendment by operation of law,  
§4-28-208.**Applicability of provisions, §4-28-203.**Existing nonprofit corporations,  
§4-28-204.**Articles of incorporation.**

Amendments, §4-28-206.

Operation of law, §4-28-208.

Approval by circuit court, §4-28-206.

Charitable, religious, etc.,  
organizations.Certain provisions deemed included  
in articles, §4-28-207.

Filing requirements, §4-28-206.

Private foundations.

Certain provisions deemed included  
in articles, §4-28-208.**Assets.**

Dissolution.

Disposition of assets upon  
dissolution, §4-28-207.**Audits.**

State financial assistance.

Nonprofit organizations receiving,  
§4-28-104.**Benevolent corporations.**Fees for religious, literary, benevolent,  
etc., corporations, §4-28-102.**Books and records.**

Keeping, §4-28-218.

**Charities.**

Articles of incorporation.

Amendment by operation of law,  
§4-28-207.Inclusion of certain provisions  
declared, §4-28-207.**Citation of act, §4-28-201.****Conflicts of interest.**

Loans to directors and officers.

Prohibited, §4-28-220.

**Consent.**Corporation's acceptance of consent,  
§4-28-224.**Construction and interpretation.**

Applicability of subchapter, §4-28-203.

Preexisting corporations.

Effect of subchapter on preexisting  
corporations, §4-28-204.**Contracts.**

Powers of corporations, §4-28-209.

**Conversion to public water  
authority, §4-28-225.****Conveyances.**

Powers of corporations, §4-28-209.

**NONPROFIT CORPORATIONS**

(1987) —Cont'd

**Definitions**, §§4-28-202, 4-28-208.

- Merger or consolidation, §4-28-301.
- Statutory life insurance beneficiaries.
- Public funds, §4-28-103.

**Directors.**

- Board of directors.
- Defined, §4-28-202.
- Compensation and reimbursements, §4-28-215.
- Election, §4-28-211.
- Loans to directors prohibited, §4-28-220.
- Number, §4-28-211.
- Terms of office, §4-28-211.
- Voting, §4-28-212.

**Dissolution.**

- Disposition of assets upon dissolution, §4-28-207.
- Involuntary dissolution, §4-28-222.

**Dividends.**

- Prohibition on dividends, §4-28-219.

**Education.**

- Articles of incorporation.
- Inclusion of certain provisions in article, §4-28-207.

**Existing nonprofit corporations.**

- Effect of act upon, §4-28-204.

**Fairs and associations of public nature.**

- Generally, §4-28-101.

**Fees.**

- Members, §4-28-210.
- Payment to secretary of state, §4-28-223.

**Foreign corporations.**

- Admission, §4-28-221.
- Defined, §4-28-202.

**General powers**, §4-28-209.**Grandfather clause.**

- Preexisting corporations, §4-28-204.

**Insurance.**

- Key-man life insurance.
- Use of public funds to purchase prohibited, §4-28-103.
- Life insurance naming religious, educational, etc., institution, organization, etc., as beneficiary, §4-28-103.

**Involuntary dissolution**, §4-28-222.**Lawful purposes**, §4-28-205.**Life insurance.**

- Key-man life insurance purchase with public funds, §4-28-103.
- Religious, educational, etc., institution, organization, etc., named as beneficiary in life insurance policy, §4-28-103.

**NONPROFIT CORPORATIONS**

(1987) —Cont'd

**Literature.**

- Fees for religious, literary, benevolent, etc., corporations, §4-28-102.

**Loans.**

- Prohibited to directors and officers, §4-28-220.

**Members.**

- Compensation and reimbursements, §4-28-215.
- Fees, §4-28-210.

**Merger and consolidation.**

- Abandonment, §4-28-304.
- Articles of incorporation.
- Inclusion of certain provisions of charitable, religious, etc., organizations, §4-28-207.
- Articles of merger or consolidation.
- Domestic corporations, §4-28-305.
- Certificate of merger or consolidation.
- Domestic corporations.
- Effectuation of merger or consolidation upon issuance of certificate, §4-28-306.
- Continuation of prior corporate existence.
- Limited purpose, §4-28-309.
- Definitions, §4-28-301.
- Domestic corporations.
- Articles of merger or consolidation, §4-28-305.
- Certificate of merger or consolidation.
- Effectuation of merger or consolidation upon issuance of certificate, §4-28-306.
- Effect, §4-28-307.
- Foreign with domestic corporations, §4-28-308.
- Plan of consolidation, §4-28-303.
- Plan of merger, §4-28-302.
- Effect of, §4-28-307.
- Foreign corporations.
- Merger or consolidation with domestic corporation, §4-28-308.
- Meaning of terms, §4-28-301.
- Plan of consolidation.
- Adoption.
- Procedure, §4-28-304.
- Domestic corporations, §4-28-303.
- Plan of merger.
- Domestic corporations, §4-28-302.
- Preexisting corporations.
- Continuation of prior corporate existence for limited purpose, §4-28-309.

**NONPROFIT CORPORATIONS**

(1987) —Cont'd

**Mortgages and deeds of trust.**

Powers of corporation, §4-28-209.

**Officers.**Compensation and reimbursements,  
§4-28-215.Loans to directors and officers  
prohibited, §4-28-220.

Required officers, §4-28-213.

Terms, §4-28-213.

**Personal property.**

Powers as to, §4-28-209.

**Plan of merger.**

Adoption.

Procedure, §4-28-304.

**Powers.**

Generally, §4-28-209.

**Preexisting corporations.**Effect of provisions on preexisting  
corporations, §4-28-204.

Merger or consolidation.

Continuation of prior corporate  
existence for limited purpose,  
§4-28-309.**Private foundations.**

Articles of incorporation.

Certain provisions deemed included  
in articles, §4-28-208.**Proxy appointments.**

Corporation's acceptance, §4-28-224.

**Purposes, §4-28-205.****Real property.**

Powers as to, §4-28-209.

**Records.**

Books and accounting records.

Keeping, §4-28-218.

**Registered agents.**Model registered agents act,  
§§4-20-101 to 4-20-118.**Regulation of nonprofit corporation  
activities by state agencies,  
§4-28-217.****Religion.**

Articles of incorporation.

Inclusion of certain provisions in  
article, §4-28-207.Religious, literary, benevolent, etc.,  
corporations.

Fees, §4-28-102.

**Rules and regulations.**State agency regulations applicable,  
§4-28-207.**Secretary of state.**Fees to be paid to secretary of state,  
§4-28-223.Powers regarding nonprofit  
corporations.

Generally, §4-28-216.

**NONPROFIT CORPORATIONS**

(1987) —Cont'd

**Secretary of state —Cont'd**

Service of process.

Registered agent, §4-28-214.

Solicitation of contributions.

Filings for secretary, §4-28-404.

**Service of process.**

Procedure, §4-28-214.

Secretary of state as registered agent,  
§4-28-214.**Short title, §4-28-201.****State departments and agencies.**Rules and regulations by state  
agencies applicable, §4-28-217.**State financial assistance.**Audit of nonprofit organizations  
receiving, §4-28-104.**Stock and stockholders.**

Dividends.

Prohibition on dividends, §4-28-219.

Prohibition of shares of stock,  
§4-28-219.**Title of act, §4-28-201.****Uniform unincorporated nonprofit  
associations, revised act,  
§§4-28-601 to 4-28-636.****Voting of member, §4-28-212.**Corporation's acceptance of votes,  
§4-28-224.**Waiver.**Corporation's acceptance of waiver,  
§4-28-224.**Water authorities.**Conversion to public water authority,  
§4-28-225.

Generally, §§4-35-101 to 4-35-306.

**NONPROFIT CORPORATIONS**

(1993).

**Admission of members, §§4-33-601,  
4-33-602.****Agents.**

Indemnification, §4-33-856.

**Amendment of chapter.**Reservation of power by general  
assembly, §4-33-102.**Appeals.**Denial of reinstatement following  
administrative dissolution,  
§4-33-1423.

Filing of documents.

Secretary's of state refusal,  
§4-33-126.

Foreign corporations.

Revocation of certificate of authority,  
§4-33-1531.**Application of law.**Existing domestic corporations,  
§4-33-1701.

**NONPROFIT CORPORATIONS**

(1993) —Cont'd

**Application of law** —Cont'd

Qualified foreign corporations,  
§4-33-1702.

**Articles of amendment**, §4-33-1005.**Articles of dissolution.**

Voluntary dissolution, §4-33-1404.

**Articles of incorporation.**

Admission of members, §4-33-601.

**Amendment.**

Approval by third persons,  
§4-33-1030.

Articles of amendment, §4-33-1005.

Authority to amend, §4-33-1001.

By directors, §4-33-1002.

By directors and members,  
§4-33-1003.

Cancelling membership, §4-33-1031.

Class voting by members,  
§4-33-1004.

Effect, §4-33-1008.

Judicial reorganization, §4-33-1007.

Private foundations, §4-33-150.

Redeeming memberships,  
§4-33-1031.

Termination of members,  
§4-33-1031.

Contents, §4-33-202.

Default provisions for organizations  
described in IRC 501(c)(3),  
§4-33-150.

Delegates, §4-33-640.

Directors' powers, §4-33-801.

Directors' terms, §§4-33-805, 4-33-806.

Execution, §4-33-202.

Number of directors, §4-33-803.

Restated articles, §4-33-1006.

Effect, §4-33-1008.

**Articles of merger**, §4-33-1104.**Assessments against members.**

Liability, §4-33-613.

**Assets.**

Deposit with state treasurer upon  
dissolution, §4-33-1440.

Mortgaging, §4-33-1201.

Sale and regular course of activities,  
§4-33-1201.

Sale other than regular course of  
activities, §4-33-1202.

**Beginning of existence**, §4-33-203.**Bylaws.**

Admission of members, §4-33-601.

Adoption, §4-33-206.

**Amendment.**

Approval by third persons,  
§4-33-1030.

By directors, §4-33-1020.

**NONPROFIT CORPORATIONS**

(1993) —Cont'd

**Bylaws** —Cont'd**Amendment** —Cont'd

By directors and members,  
§4-33-1021.

Cancelling membership, §4-33-1031.

Redeeming memberships,  
§4-33-1031.

Termination of members,  
§4-33-1031.

Contents, §4-33-206.

Delegates, §4-33-640.

Directors' delegation authority to  
officers, §4-33-840.

Directors' qualifications, §4-33-802.

Directors' terms, §§4-33-805, 4-33-806.

Emergency bylaws, §4-33-207.

Number of directors, §4-33-803.

Record date for determining members  
entitled to notice of and authority  
to vote at meeting, §4-33-707.

**Certificate of existence**, §4-33-128.

Form to be used, §4-33-121.

**Certificate of withdrawal.**

Foreign corporations.

Form of certificate to be used,  
§4-33-121.

**Certificates of authority.**

Amended certificates.

Foreign corporations, §4-33-1504.

Applications.

Foreign corporations, §4-33-1503.

Effect.

Foreign corporations, §4-33-1505.

Foreign corporations.

Amended certificates, §4-33-1504.

Applications for certificates,  
§4-33-1503.

Effect of certificate, §4-33-1505.

Form of certificate to be used,  
§4-33-121.

Revocation.

Foreign corporation, §§4-33-1530 to  
4-33-1532.

**Charitable organizations.**

Articles of incorporation.

Default provisions, §4-33-150.

**Citation of chapter.**

Short title, §4-33-101.

**Claims.**

Known claims against voluntary  
dissolved corporation, §4-33-1407.

Unknown claims against voluntary  
dissolved corporation, §4-33-1408.

**Committees of the board**, §4-33-825.**Conflicts of interest.**

Directors, §4-33-831.

**NONPROFIT CORPORATIONS**

(1993) —Cont'd

**Contracts.**

Officers' rights, §4-33-844.

**Conversion to public water authority, §4-33-1601.****Cooperatives.**

Subchapter T, IRS Code of 1986.

Authorized distributions,  
§4-33-1302.**Copying fees, §4-33-122.****Correcting filed documents,  
§4-33-124.****Credit and creditors.**Action by creditor against member,  
§4-33-614.**Date chapter effective, §4-33-1706.****Definitions.**

General definitions, §4-33-140.

Indemnification, §4-33-850.

**Delegates, §4-33-640.****Directors.**

Action without meeting, §4-33-821.

Amendment of articles of  
incorporation, §§4-33-1002,  
4-33-1003.Amendment of bylaws, §§4-33-1020,  
4-33-1021.

Appointment, §4-33-804.

Committees of the board, §4-33-825.

Compensation, §4-33-812.

**Conduct standards.**

Conflicts of interest, §4-33-831.

General standards, §4-33-830.

Loans to or guaranties for directors,  
§4-33-832.

Unlawful distributions, §4-33-833.

Conflicts of interest, §4-33-831.

Consent to action without meeting,  
§4-33-821.Delegation of authority to officers,  
§4-33-840.

Designation, §4-33-804.

**Distributions.**Liability for unlawful distributions,  
§4-33-833.

Duties, §4-33-801.

Election, §4-33-804.

At organizational meeting,  
§4-33-205.Cumulative voting by members,  
§4-33-725.Other methods of electing  
directors, §4-33-726.

Guaranties for, §4-33-832.

**Indemnification.**

Generally, §§4-33-850 to 4-33-858.

Individual judgment, §4-33-802.

**NONPROFIT CORPORATIONS**

(1993) —Cont'd

**Directors —Cont'd**

Loans to, §4-33-832.

**Meetings.**

Calling, §4-33-822.

Notice, §4-33-822.

Waiver, §4-33-823.

Regular meetings, §4-33-820.

Special meetings, §4-33-820.

**Mergers.**Actions on plan of merger,  
§4-33-1103.

Numbers, §4-33-803.

Qualifications, §4-33-802.

Quorum, §4-33-824.

**Removal.**Designated or appointed directors,  
§4-33-809.Directors elected by members or  
directors, §4-33-808.Removal by judicial proceeding,  
§4-33-810.

Required, §4-33-801.

Resignation, §4-33-807.

**Standards of conduct.**

Conflicts of interest, §4-33-831.

General standards, §4-33-830.

Loans to or guaranties for director,  
§4-33-832.

Unlawful distributions, §4-33-833.

Terms, §4-33-805.

Staggered terms, §4-33-806.

**Vacancies.**Filling, §§4-33-805, 4-33-807,  
4-33-811.Voluntary dissolution of corporation,  
§§4-33-1401, 4-33-1402.

Voting, §4-33-824.

**Dissolution.****Administrative dissolution.**Reinstatement following appeal from  
denial of reinstatement,  
§4-33-1423.Charitable, religious, literary, etc.,  
organizations.Default provisions in articles of  
incorporation, §4-33-150.Deposit of assets with state treasurer,  
§4-33-1440.**Effect.**

Voluntary dissolution, §4-33-1406.

Members' rights and obligations.

Differences, §4-33-610.

**Voluntary dissolution.**

Articles of dissolution, §4-33-1404.

By directors, §§4-33-1401, 4-33-1402.

By incorporators, §4-33-1401.

**NONPROFIT CORPORATIONS**

(1993) —Cont'd

**Dissolution** —Cont'd

Voluntary dissolution —Cont'd

By members, §4-33-1402.

By third persons, §§4-33-1401,  
4-33-1402.Claims against dissolved  
corporations.

Known claims, §4-33-1407.

Unknown claims, §4-33-1408.

Effect, §4-33-1406.

**Distributions.**

Authorized distributions, §4-33-1302.

Prohibited distributions, §4-33-1301.

Unlawful distributions.

Directors' liability, §4-33-833.

**Documentary corrections, §4-33-124.****Document's effective date, §4-33-123.****Dues of members.**

Liability, §4-33-613.

**Educational organizations.**

Articles of incorporation.

Default provisions, §4-33-150.

**Effective date of chapter, §4-33-1706.****Election of director, §4-33-804.****Emergency bylaws, §4-33-207.****Emergency powers, §§4-33-207,  
4-33-303.****Employees.**

Indemnification, §4-33-856.

**Evidence.**Conditions precedent to incorporation,  
§4-33-203.

Copy of filed document, §4-33-127.

**Execution of article, §4-33-202.****Execution of documents, §4-33-120.**

Officers' authority, §4-33-845.

Penalty for signing false document,  
§4-33-129.**Existence.**

When begins, §4-33-203.

**Existing domestic corporations.**

Application of provisions, §4-33-1701.

**Existing foreign corporations.**

Application of provisions, §4-33-1702.

**False documents.**

Penalty for signing, §4-33-129.

**Fees.**Filing, service and copying fees,  
§4-33-122.

Member's liability, §4-33-613.

**Filing of documents.**

Correcting filed documents, §4-33-124.

Date document effective, §4-33-123.

Evidentiary effect of copy of filed  
document, §4-33-127.

Fees, §4-33-122.

**NONPROFIT CORPORATIONS**

(1993) —Cont'd

**Filing of documents** —Cont'd

Form to be used, §§4-33-120, 4-33-121.

Place of filing, §4-33-120.

Requirements, §4-33-120.

Secretary's of state duty, §4-33-125.

Appeal from secretary's refusal to  
file document, §4-33-126.**Foreign corporations.**Applicability of provisions to qualified  
foreign corporations, §4-33-1702.

Authority to transact business.

Consequences of transacting  
business without authority,  
§4-33-1502.

Required, §4-33-1501.

Certificate of existence, §4-33-128.

Certificate of withdrawal.

Form to be used, §4-33-121.

Certificates of authority.

Amended certificates, §4-33-1504.

Application, §4-33-1503.

Effect, §4-33-1505.

Form to be used, §4-33-121.

Revocation.

Appeal from, §4-33-1532.

Effect, §4-33-1531.

Grounds, §4-33-1530.

Procedure, §4-33-1531.

Merger with foreign corporations,  
§4-33-1106.

Name of corporation, §4-33-1506.

Registered agent, §4-33-1507.

Change, §4-33-1508.

Resignation, §4-33-1509.

Registered office, §4-33-1507.

Change, §4-33-1508.

Service on foreign corporation,  
§4-33-1510.

Transaction of business.

Authority required, §4-33-1502.

Consequences of transacting  
business without authority,  
§4-33-1502.

Withdrawal, §4-33-1520.

**Form of documents, §§4-33-120,  
4-33-121.****General assembly.**Reservation of power to amend or  
repeal chapter, §4-33-102.**General powers, §4-33-302.****Gifts.**

Merger, §4-33-1107.

**Guarantees to directors and officers,  
§4-33-832.****Habilitative services corporations,  
§§4-34-102 to 4-34-107.**

**NONPROFIT CORPORATIONS**

(1993) —Cont'd

**Incorporation**, §4-33-203.**Incorporators**, §4-33-201.

Liability for preincorporation transactions, §4-33-204.

Organizational meeting, §4-33-205.

Signing of article, §4-33-202.

Voluntary dissolution of corporation, §4-33-1401.

**Indemnification.**

Advance for expenses, §4-33-853.

Applicability of provisions, §4-33-858.

Authority to indemnify, §4-33-851.

Court-ordered indemnification, §4-33-854.

Definitions, §4-33-850.

Determination and authorization, §4-33-855.

Insurance, §4-33-857.

Mandatory indemnification, §4-33-852.

Officers, employees and agents, §4-33-856.

**Insurance.**

Indemnification of director, etc., §4-33-857.

**Invalidity of some provisions.**

Severability of provisions of chapter, §4-33-1704.

**Judicial reorganization.**

Amendment of articles pursuant to, §4-33-1007.

**Liability.**

Member's liability for dues, assessments and fees, §4-33-613.

Member's liability to third parties, §4-33-612.

Preincorporation transactions, §4-33-204.

**Literary organizations.**

Articles of incorporation.

Default provisions, §4-33-150.

**Loans.**

Loans to directors and officers, §4-33-832.

**Meetings.**

Annual meetings of members, §4-33-701.

Calling of directors' meetings, §4-33-822.

Calling or conducting.

Court orders, §4-33-160.

Court-ordered meetings of members, §4-33-703.

Emergency bylaws and powers, §4-33-207.

Notice of directors' meetings, §4-33-822.

Waiver, §4-33-823.

**NONPROFIT CORPORATIONS**

(1993) —Cont'd

**Meetings** —Cont'd

Notice of meeting of members, §4-33-705.

Determining members entitled to notice, §4-33-707.

List of members entitled to notice, §4-33-720.

Waiver, §4-33-706.

Organizational meeting, §4-33-205.

Regular meetings of directors, §4-33-820.

Regular meetings of members, §4-33-701.

Special meetings of directors, §4-33-820.

Special meetings of members, §4-33-702.

**Membership.**

Action by written consent, §4-33-704.

Admission, §4-33-601.

Consideration, §4-33-602.

Amendment of articles of incorporation, §§4-33-1003, 4-33-1004.

Amendment of bylaws, §§4-33-1021, 4-33-1022.

Cancelling memberships.

Amendment of bylaws or articles of incorporation, §4-33-1031.

Creditor's action against member, §4-33-614.

Differences in rights and obligations, §4-33-610.

Dues, assessments and fees, §4-33-613.

Expulsion, §4-33-621.

Liability of members to third parties, §4-33-612.

Meetings of members.

Annual meetings, §4-33-701.

Court-ordered meetings, §4-33-703.

Notice, §4-33-705.

Determining members entitled to notice, §4-33-707.

List of members entitled to notice, §4-33-720.

Waiver, §4-33-706.

Regular meetings, §4-33-701.

Special meetings, §4-33-702.

**Mergers.**

Action on plan of merger, §4-33-1103.

No requirement members, §4-33-603.

Proxy voting, §4-33-724.

Purchase, §4-33-622.

Quorum requirements, §4-33-722.

**NONPROFIT CORPORATIONS**

(1993) —Cont'd

**Membership** —Cont'd

Redeeming memberships.

Amendment of bylaws or articles of incorporation, §4-33-1031.

Resignation of member.

Continuation of obligations, §4-33-620.

Suspension, §4-33-621.

Termination, §4-33-621.

Amendment of bylaws or articles of incorporation, §4-33-1031.

Transfer rights, §§4-33-610, 4-33-611.

Voluntary dissolution of corporation, §4-33-1402.

Voting agreements, §4-33-730.

Voting by members.

Action by written ballot, §4-33-708.

Amendment of bylaws, §§4-33-1021, 4-33-1022.

Amendments to articles of incorporation, §§4-33-1003, 4-33-1004.

Corporation's acceptance of votes, §4-33-727.

Election of directors.

Cumulative voting, §4-33-725.

Other methods of electing directors, §4-33-726.

List of members entitled to vote, §4-33-720.

Proxies, §4-33-724.

Quorum requirements, §4-33-722.

Requirements, §4-33-723.

Right to vote, §4-33-721.

**Mergers.**

Action on plan by board, members and third persons, §4-33-1103.

Approval of plan, §4-33-1101.

Articles of merger, §4-33-1104.

Continuation of prior corporate existence for limited purpose, §4-33-1108.

Effect of merger, §4-33-1105.

Foreign corporation, §4-33-1106.

Limitations on mergers by public benefit or religious corporations, §4-33-1102.

Requests, devises and gifts, §4-33-1107.

**Mortgage of assets, §4-33-1201.****Mutual benefit corporations.**

Election to be governed by nonprofit corporation law, §4-33-1707.

Purchase of memberships, §§4-33-622, 4-33-1302.

**NONPROFIT CORPORATIONS**

(1993) —Cont'd

**Names.**

Corporate name, §4-33-401.

Foreign corporations, §4-33-1506.

Registered name, §4-33-403.

Reserved name, §4-33-402.

**Notice, §4-33-141.**

Designation of directors, §4-33-807.

Directors' meetings, §4-33-822.

Waiver of notice, §4-33-823.

Meeting of members, §4-33-705.

Determining members entitled to notice, §4-33-707.

List of member entitled to notice, §4-33-720.

Waiver of notice, §4-33-706.

Removal of directors, §§4-33-808, 4-33-809.

**Officers.**

Contract rights, §4-33-844.

Execution of documents, §4-33-845.

Guaranties to, §4-33-832.

Indemnification.

Generally, §§4-33-850 to 4-33-858.

Loans to, §4-33-832.

Removal, §4-33-843.

Effect on contract rights, §4-33-844.

Required officers, §4-33-840.

Resignation, §4-33-843.

Simultaneous officeholding, §4-33-840.

Standards of conduct, §4-33-842.

**Officer's conduct standards, §4-33-842.****Orders.**

Judicial intervention into affairs of corporations, §4-33-160.

**Organizational meeting, §4-33-205.****Organization by incorporators, §4-33-201.****Powers.**

Emergency powers, §4-33-303.

Enumeration of general powers, §4-33-302.

Limitations, §4-33-302.

Ultra vires, §4-33-304.

**Preincorporation transactions.**

Liability, §4-33-204.

**Private foundations.**

Articles of incorporation, §4-33-150.

**Public benefit corporations.**

Election to be governed by nonprofit corporation law, §4-33-1707.

Limitations on merger, §4-33-1102.

**Purchase of memberships, §4-33-622.****Purposes, §4-33-301.****Quorum of board, §4-33-824.**

**NONPROFIT CORPORATIONS**

(1993) —Cont'd

**Redemption.**

Members' rights and obligations,  
§4-33-610.

**Registered agent.**

Change.  
Foreign corporations, §4-33-1508.  
Foreign corporations, §4-33-1507.  
Change, §4-33-1508.  
Resignation, §4-33-1509.  
Model registered agents act,  
§§4-20-101 to 4-20-118.  
Resignation.  
Foreign corporation, §4-33-1509.

**Registered name, §4-33-403.****Registered office.**

Change.  
Foreign corporations, §§4-33-1507,  
4-33-1508.

**Rehabilitative services corporations,  
§§4-34-101 to 4-34-107.****Reinstatement following  
administrative dissolution,  
§4-33-1422.**

Appeal from denial, §4-33-1423.

**Religious organizations.**

Articles of incorporation.  
Default provisions, §4-33-150.  
Constitutional protection, §4-33-180.  
Election to be governed by nonprofit  
corporation law, §4-33-1707.  
Limitations on merger, §4-33-1102.  
Purchase of memberships, §4-33-622.  
Removal of directors, §4-33-808.  
Judicial proceeding, §4-33-810.  
Repeal of conflicting acts, §4-33-1705.

**Repeal of statutes.**

Reservation of power by general  
assembly, §4-33-102.  
Savings provisions, §4-33-1703.

**Reserved name, §4-33-402.****Restated articles of incorporation,  
§4-33-1006.**

Effect, §4-33-1008.

**Rural fire protection corporations,  
§§4-34-103 to 4-34-107.****Sale of assets.**

In regular course of activities,  
§4-33-1201.  
Other than in regular course of  
activities, §4-33-1202.

**Savings provisions, §4-33-1703.****Scientific organizations.**

Articles of incorporation.  
Default provisions, §4-33-150.

**NONPROFIT CORPORATIONS**

(1993) —Cont'd

**Secretary of state.**

Filing duty of secretary, §4-33-125.  
Appeal from secretary's refusal to  
file document, §4-33-126.

**Powers.**

Annual disclosure of information,  
§4-33-131.  
General powers, §4-33-130.

**Service of process.**

Fees, §4-33-122.  
On foreign corporation, §4-33-1510.

**Severability of provisions,  
§4-33-1704.****Short title, §4-33-101.****Signing false documents, §4-33-129.****Third parties.**

Member's liability, §4-33-611.

**Transfers.**

Members' rights and obligations,  
§4-33-611.  
Differences, §4-33-610.

**Ultra vires act, §4-33-304.****Uniform unincorporated nonprofit  
association, revised act,  
§§4-28-601 to 4-28-636.****Voting by directors, §4-33-824.****Voting by members.**

Action by written ballot, §4-33-708.  
Agreements among members,  
§4-33-730.  
Amendment of bylaws, §§4-33-1021,  
4-33-1022.  
Amendments to articles of  
incorporation, §§4-33-1003,  
4-33-1004.  
Corporation's acceptance of votes,  
§4-33-727.  
Differences in rights and obligations,  
§4-33-610.  
Election of directors.  
Cumulative voting, §4-33-725.  
Other methods of electing  
directors, §4-33-726.  
Judicial intervention into affairs of  
corporations, §4-33-160.  
List of members entitled to vote,  
§4-33-720.  
Proxies, §4-33-724.  
Quorum requirements, §4-33-722.  
Requirements, §4-33-723.  
Right to vote, §4-33-721.

**Water authorities.**

Conversion to public water authority,  
§4-33-1601.  
Generally, §§4-35-101 to 4-35-306.

**NONPROFIT CORPORATIONS**

(1993) —Cont'd

**Wills.**Requests and devises after merger,  
§4-33-1107.**Withdrawal.**Foreign corporations, §4-33-1520.  
Form of certificate to be used,  
§4-33-121.**NONRESIDENTS.****Charitable organizations soliciting contributions in state.**Consent to action, suit or proceeding,  
service of process, §4-28-413.**NOTARIES PUBLIC.****Notario or notario publico.**Advertising services using terms,  
§§4-109-101 to 4-109-105.  
Attorneys, inapplicability to,  
§4-109-104.  
Definitions, §4-109-101.  
Disclosure required in  
advertisement, §4-109-103.  
Prohibited acts or practices,  
§4-109-102.  
Violation unconscionable or  
deceptive act or practice,  
§4-109-105.**NOTARIO OR NOTARIO PUBLICO.****Advertising services using terms.**

Restrictions, §§4-109-101 to 4-109-105.

**NOTES.****Actions.**

Small notes, tickets or bills, §4-17-104.

**Attorneys at law.**Fees.  
Allowable provisions in promissory  
notes for fees, §4-56-101.**Criminal law and procedure.**

Defined, §4-3-104.

**Currency.**Creation and circulation by individuals  
unlawful, §4-17-102.  
Issuance by local subdivisions  
unlawful, §4-17-103.**Dishonor, §4-3-502.****Effect on obligation for which taken,  
§4-3-310.****Negotiable instruments generally,  
§§4-3-101 to 4-3-605.****Obligation of issuer, §4-3-412.****NOTICE.****Corporations.**Directors.  
Meetings, §§4-26-805, 4-27-822.  
Waiver, §4-27-823.**NOTICE —Cont'd****Corporations —Cont'd****Dissolution.**Creditors to be notified, §4-26-1105.  
Unknown claims, §4-27-1407.**Forms, §4-27-141.****Stock and stockholders.**Meetings, §§4-26-703, 4-27-705.  
Waiver, §4-27-706.**Waiver of notice, §4-26-105.****Credit reporting disclosures.**Denial of credit, further extension or  
increase in limits of existing  
credit.Contents of notice of adverse action,  
§4-93-104.Responsibility of user of consumer  
report to notify consumer of  
adverse action, §4-93-103.Damages for failure to provide  
notification, §4-93-104.**Credit report security freezes.**

Notice of rights, §4-112-111.

Unauthorized access, §4-112-104.

**Dental corporations.**Suspension or revocation of certificate  
of registration, §4-29-411.**Franchises.**

Petroleum products franchises.

Dealer-supplier or distributor  
franchises.Cancellation, termination or  
refusal to renew, §4-72-502.

Supplier-distributor franchises.

Cancellation, termination or  
refusal to renew franchise,  
§4-72-402.Termination, cancellation or failure to  
renew, §4-72-204.Transfer, assignment or sale of  
franchise, §4-72-205.**Health spas.**

Consumer protection.

Cancellation of contracts for health  
spa services, §4-94-109.**Home solicitation sales.**Cancellation of offer or contract,  
§§4-89-107, 4-89-108.**Investment securities.**

Adverse claims, §4-8-105.

Defects or defenses, §§4-8-202,  
4-8-203.Issuer to receive notice of lost,  
destroyed, or wrongfully taken  
security certificate, §4-8-406.**Lemon law.**

Claim by consumer, §4-90-404.

**NOTICE —Cont'd****Limited liability companies.**

## Dissolution.

Filing of articles of dissolution constitutes notice, §4-32-904.

Known claimants, §4-32-907.

Unknown claimants, §4-32-908.

Notice to member or manager charged to company, §4-32-303.

**Limited liability partnerships.**

Intent to revoke statement of qualification.

Failure to file annual report, §4-46-1003.

**Limited partnerships.**

## Dissolution.

Claims known at time of dissolution, §4-47-806.

Claims not known at time of dissolution, §4-47-807.

Foreign limited partnerships.

Certificate of authority, revocation, §4-47-906.

When person has notice and knowledge, §4-47-103.

**Medical corporations.**

Suspension or revocation of registration certificates, §4-29-310.

Notice of appeal, §4-29-311.

**Natural resources commission.**

## Water authorities.

Dissolution, §4-35-111.

**Negotiable instruments.**

## Third party.

Written notice.

Right to defend action, §4-3-119.

**Nonprofit corporations (1993),**  
§4-33-141.

Designation of directors, §4-33-807.

Directors' meetings, §4-33-822.

Waiver of notice, §4-33-823.

Meeting of members, §4-33-705.

Determining members entitled to notice, §4-33-707.

List of member entitled to notice, §4-33-720.

Waiver of notice, §4-33-706.

Removal of directors, §§4-33-808, 4-33-809.

**Partnerships, §4-46-102.**

## Limited partnerships.

## Dissolution.

Claims known at time of dissolution, §4-47-806.

Claims not known at time of dissolution, §4-47-807.

Foreign limited partnerships.

Certificate of authority, revocation, §4-47-906.

**NOTICE —Cont'd****Partnerships —Cont'd**

## Limited partnerships —Cont'd

When person has notice and knowledge, §4-47-103.

**Personal information protection act.**

Breach of security system, §4-110-105.

**Professional corporations.**

## Certificate of registration.

Suspension or revocation, §4-29-211.

**Refund anticipation loans.**

Application disclosures, §4-116-105.

Fee schedules and disclosures to be posted, §4-116-104.

**Secured transactions.**

## Repossession on default.

Notification before disposition, §4-9-611.

Form and content, §4-9-613.

Consumer goods transactions, §4-9-614.

Timeliness, §4-9-612.

**Water authorities, §4-35-206.**

## Bond issues.

Issuance of bonds, §4-35-301.

Dissolution, §4-35-111.

Special meetings of the board of directors, §4-35-204.

**O****ODOMETER REGULATIONS,**

§§4-90-201 to 4-90-207.

**Civil actions for fraud, §4-90-207.****Criminal penalties, §4-90-203.****Definitions, §4-90-202.****Disclosures upon transfer of vehicle,**  
§4-90-206.**Enforcement, §4-90-203.****Purpose of act, §4-90-201.****Service, repair or replacement,**  
§4-90-205.**Tampering, §4-90-204.****Violations as unfair trade practices,**  
§4-90-203.**OFFER AND ACCEPTANCE.****Leases, UCC.**

Firm offers, §4-2A-205.

Generally, §4-2A-206.

**Sale of goods, UCC, §4-2-206.**

Auctions, §4-2-328.

Firm offers, §4-2-205.

**OIL AND GAS.****Contracts.**

Sale of goods.

Applicability of sales chapter of commercial code, §4-2-107.

**OIL AND GAS —Cont'd****Criminal law and procedure.**

Quality specifications for engine fuels,  
petroleum products and  
automotive lubricants, §4-108-209.

**Franchises.**

Petroleum products franchises,  
§§4-72-401 to 4-72-503.

**Injunctions.**

Quality specifications for engine fuels,  
petroleum products and  
automotive lubricants, §4-108-210.

**Penalties.**

Quality specifications for engine fuels,  
petroleum products and  
automotive lubricants.  
Civil penalties, §4-108-208.

**Quality specifications for engine  
fuels, petroleum products and  
automotive lubricants,**

§§4-108-201 to 4-108-213.

Citation of act, §4-108-211.

Civil penalties, §4-108-208.

Criminal penalties, §4-108-209.

Definitions, §4-108-203.

Engine fuels designed for special use.

Registration, §4-108-206.

Injunctions, §4-108-210.

Plant board.

Administration by director,  
§4-108-204.

Adoption of standards and rules,  
§§4-108-204, 4-108-212.

State petroleum products division,  
§4-108-205.

Prohibited acts, §4-108-207.

Civil penalties, §4-108-208.

Criminal penalties, §4-108-209.

Restraining order and injunction,  
§4-108-210.

Purpose of provisions, §4-108-201.

Repeal of prior enabling statute.

Regulations unaffected by,  
§4-108-213.

Restraining order and injunction,  
§4-108-210.

Scope of provisions, §4-108-202.

Special use.

Registration of engine fuels designed  
for, §4-108-206.

State petroleum products division,  
§4-108-205.

Title of act, §4-108-211.

**ORDERS.****Going out of business sales.**

Sales under order of court excepted  
from chapter, §4-74-103.

**ORDERS —Cont'd****Nonprofit corporations (1993).**

Judicial intervention into affairs of  
corporations, §4-33-160.

**ORDINANCES AND RESOLUTIONS.****Charitable contributions,  
solicitation.**

City or incorporated town not  
prohibited from enacting,  
§4-28-414.

**Solicitation of charitable  
contributions.**

City or incorporated town not  
prohibited from enacting,  
§4-28-414.

**P****PAID SOLICITORS.****Solicitation of charitable  
contributions, §4-28-407.**

Defined, §4-28-401.

**PAROL EVIDENCE.****Contracts.**

Sale of goods, §4-2-202.

**Leases.**

Commercial code, §4-2A-202.

**Negotiable instruments.**

Other agreements affecting  
instrument, §4-3-117.

**Sale of goods.**

Contracts, §4-2-202.

**PARTIES.****Foreign investor companies.**

Capacity to sue and be sued,  
§4-31-204.

**Investments.**

Foreign investment companies.  
Capacity to sue and be sued,  
§4-31-204.

**Limited liability companies.**

Members as parties to actions,  
§4-32-305.

**Limited partnerships.**

Derivative actions.  
Proper plaintiff, §4-47-1003.

**Negotiable instruments.**

Defined, §4-3-103.

**PARTNERSHIPS, §§4-46-101 to  
4-46-1207.****Access to books and records.**

Rights of partners to, §4-46-403.

**Account, partner deemed to have,  
§4-46-401.**

**PARTNERSHIPS —Cont'd****Acquisition of property by partnership.**

Property of partnership, §§4-46-203, 4-46-204.

**Actions.**

By or against partnerships and partners, §4-46-307.

By partnership against partner, §4-46-405.

Liability for partner's actionable conduct, §4-46-305.

Liability for partnership obligations, §4-46-306.

Liability of purported partner, §4-46-308.

Wrongful dissociation, liability, §4-46-602.

**Acts of partner.**

Binding on partnership, §4-46-301.

Dissociation business not wound up, §4-46-702.

Dissolution and winding up.

Acts after dissolution, §4-46-804.

Liability of partners for, §4-46-305.

**Advances by partner.**

Reimbursement, §4-46-401.

**Agent of partnership.**

Partner deemed, §4-46-301.

**Amendment of chapter.**

Partnerships subject to, §4-46-107.

**Amendment of statements, §4-46-105.**

Statement defined, §4-46-101.

**Assumed names.**

Business under assumed name.

Exceptions as to certain limited partnerships, §4-70-201.

**Authority of partnership.**

Statement of, §4-46-303.

**Books and records.**

Rights and duties, §4-46-403.

**Buyout price.**

Purchase of partner's interest.

Dissociation, business not wound up, §4-46-701.

**Cancellation of statements,**

§4-46-105.

Statement defined, §4-46-101.

Statement of partnership authority.

By operation of law, §4-46-303.

**Compensation for services**

**performed for partnership,** §4-46-401.

**Conduct of partners.**

Standards, §4-46-404.

**Consent of all partners.**

Act outside ordinary course of business, §4-46-401.

**PARTNERSHIPS —Cont'd****Consent of all partners —Cont'd**

Becoming partner, §4-46-401.

**Construction of chapter, §4-46-1201.****Continuation after dissolution,** §4-46-802.**Continued use of partnership name.**

Dissociation from partnership.

Business not wound up, §4-46-705.

**Conversion.**

Amendment of plan, §4-46-903.

Articles of conversion, §4-46-904.

Consent on plan of conversion, §4-46-903.

Definitions, §4-46-901.

Effect, §4-46-905.

Filings required, §4-46-904.

Foreign organizations, §4-46-905.

Liability after, §4-46-911.

Limited liability partnership status, relinquishing, §4-46-910.

Permissible conversions, §4-46-902.

Plan of conversion, §4-46-902.

Power of dissociated persons to bind after conversion or merger, §4-46-912.

Restrictions, §4-46-910.

Statement of qualification, §4-46-904.

Supplemental nature of provisions, §4-46-913.

When effective, §4-46-905.

**Co-owner of partnership property.**

Partner not deemed, §4-46-501.

**Damages.**

Wrongful dissociation, liability, §4-46-602.

**Date chapter effective, §4-46-1203.****Definite term.**

Continuation beyond, §4-46-406.

**Definitions, §4-46-101.**

Conversion and merger, §4-46-901.

**Denial of person's authority or status.**

Statement of denial, §4-46-304.

**Determining whether partnership formed.**

Rules applicable, §4-46-202.

**Dissociation from partnership.**

Business not wound up.

Continued use of partnership name, §4-46-705.

Partner's power to bind and liability to partnership, §4-46-702.

Liability to others, §4-46-703.

Purchase of partner's interest, §4-46-701.

Statement of dissociation, §4-46-704.

Effect, §4-46-603.

**PARTNERSHIPS —Cont'd****Dissociation from partnership —Cont'd**

- Events causing, §4-46-601.
- Partner's power, §4-46-602.
- Wrongful dissociation, §4-46-602.

**Dissolution and winding up.**

- Application, events causing, §4-46-801.
- Binding partnership after dissolution, §4-46-804.
- Continuation after dissolution, §4-46-802.
- Contributions among partners, §4-46-807.
- Events causing, §4-46-801.
- Judicial supervision of winding up, §4-46-803.
- Liability of partner to other partners, §4-46-806.
- Preservation of business or property.
  - Person winding up, §4-46-803.
- Right to wind up, §4-46-803.
  - Waiver of right to wind up and terminate business, §4-46-802.
- Settlement of accounts, §4-46-807.
- Statement of dissolution, §4-46-805.
- Transferee of partner's transferable interest.
  - Rights of, §4-46-503.
- Waiver of right to wind up and terminate business, §4-46-802.

**Distributions.**

- In kind, §4-46-402.
- Transferee of partner's transferable interest.
  - Right to, §4-46-503.

**Due care, duty of, §4-46-404.****Duties of partners, §4-46-401.**

- Information, §4-46-403.
- Loyalty and due care, §4-46-404.

**Effective date, §4-46-1203.****Entity distinct from partners, §4-46-201.****Execution of judgment against assets of partner, §4-46-307.****Execution of statements, §4-46-105.**

- Statement defined, §4-46-101.

**Expulsion of partner.**

- Dissociation from partnership.
- Events causing, §4-46-601.

**Fees.**

- Secretary of state.
- Documents delivered by electronic means, §4-42-708.

**Fictitious name, conducting business under, §4-42-707.****Fiduciary duties.**

- Duty of loyalty and due care, §4-46-404.

**PARTNERSHIPS —Cont'd****Filing statements, §4-46-105.**

- Fees, §4-46-1207.
- Statement defined, §4-46-101.

**Foreclosures.**

- Transferable interest of partner.
- Charging order, §4-46-504.

**Foreign limited liability partnerships, §§4-46-1101 to 4-46-1105.****Foreign limited partnerships, §§4-47-901 to 4-47-908.****Formation, §4-46-202.****Governing law, §4-46-106.****Indemnification of partner, §4-46-401.****Information.**

- Rights and duties of partners, §4-46-403.

**In kind distributions, §4-46-402.****Interest.**

- Rate if rate not specified in obligation, §4-46-104.

**Joint and several liability.**

- Obligations of partnership, §4-46-306.

**Judgments.**

- Against partnerships, §4-46-307.
- Transferable interest of partner.
  - Charging order, subject to, §4-46-504.

**Knowledge of facts, §4-46-102.****Lending money to partnership, §4-46-404.****Liability for partner's actionable conduct, §4-46-305.****Liability of partner after dissociation.**

- Business not wound up, §§4-46-702, 4-46-703.

**Liability of partner after dissolution, §4-46-806.****Liability of partners for partnership obligations, §4-46-306.****Liability of purported partner, §4-46-308.****Liens.**

- Transferable interest of partner.
- Charging order constitutes, §4-46-504.

**Limited liability companies****generally, §§4-32-101 to 4-32-1316.****Limited liability partnerships, §§4-46-1001 to 4-46-1105.****Limited partnerships, §§4-47-101 to 4-47-1302.****Losses.**

- Partner chargeable with equal share, §4-46-401.

**PARTNERSHIPS —Cont'd****Losses —Cont'd**

Transferable interest of partner,  
§4-46-502.

**Loyalty, duty of, §4-46-404.**

Dissociation, termination of duty,  
§4-46-603.

**Management and conduct of business.**

Dissociation from partnership.

Termination of right to participate,  
§4-46-603.

Equal right of partners to, §4-46-401.

**Merger.**

Amendment of plan, §4-46-907.

Articles of merger, §4-46-908.

Consent to plan, §4-46-907.

Definition, §4-46-901.

Effect of merger, §4-46-909.

Filings required, §4-46-908.

Liability after, §4-46-911.

Limited liability partnership status,  
relinquishing, §4-46-910.

Permissible mergers, §4-46-906.

Plan of merger, §4-46-906.

Power of dissociated persons to bind  
after conversion or merger,  
§4-46-912.

Restrictions, §4-46-910.

Supplemental nature of provisions,  
§4-46-913.

When effective, §§4-46-908, 4-46-909.

**Names.**

Business under assumed names.

Exception as to certain limited  
partnerships, §4-70-201.

Fictitious name, conducting business  
under, §4-42-707.

**Notice.**

Giving or receiving notice, §4-46-102.

Partner's notice constitutes notice to  
partnership, §4-46-102.

**Particular undertaking.**

Continuation beyond, §4-46-406.

**Partnership agreement.**

Governs relations among partners,  
§4-46-103.

Prohibited provisions, §4-46-103.

**Principles of law and equity.**

Supplemental to chapter, §4-46-104.

**Profits.**

Right to equal share, §4-46-401.

Transferable interest of partner,  
§4-46-502.

**Property acquired by partnership.**

Property of partnership, §§4-46-203,  
4-46-204.

**PARTNERSHIPS —Cont'd****Purchase of partner's interest.**

Dissociation, business not wound up,  
§4-46-701.

**Purported partners.**

Liability, §4-46-308.

**Recording statements, §4-46-105.**

Statements defined, §4-46-101.

**Recovery of partnership property from transferee, §4-46-302.****Registered agents.**

Model registered agents act,  
§§4-20-101 to 4-20-118.

**Reimbursement of partner for payments made, §4-46-401.****Relations among partners.**

Law governing, §§4-46-103, 4-46-106.

**Repeal of chapter.**

Partnerships subject to, §4-46-107.

**Rights of partners, §4-46-401.**

Information, §4-46-403.

**Savings clause, §4-46-1206.****Standards of partners' conduct, §4-46-404.****Statement of denial, §4-46-304.****Statement of dissociation, §4-46-704.****Statement of dissolution, §4-46-805.****Statement of partnership authority, §4-46-303.****Tax pass throughs.**

Small business entity tax pass  
throughs.

Limited liability companies  
generally, §§4-32-101 to  
4-32-1316.

**Title of act, §4-46-1202.****Transacting business with partnership, §4-46-404.****Transferable interest of partner.**

Charging order, subject to, §4-46-504.

Profits and losses, §4-46-502.

Transfer, §4-46-503.

**Transfer of partnership property, §4-46-302.**

Partner has no interest subject to  
transfer, §4-46-501.

**Uniformity of application, §4-46-1201.****Withdrawal of partner.**

Dissociation from partnership.

Events causing, §4-46-601.

**Wrongful act or omission by partner.**

Liability of partners, §4-46-305.

**PASSWORDS.****Consumer protection against computer spyware act, §§4-111-101 to 4-111-105.**

Personally identifiable information  
defined, §4-111-102.

**PASSWORDS —Cont'd**

**Personal information protection act,**  
§§4-110-101 to 4-110-108.

**PAYMENT ORDERS, FUNDS TRANSFERS.**

**Acceptance,** §4-4A-209.

**Amendment,** §4-4A-211.

**Authorized payment orders,**  
§4-4A-202.

**Cancellation,** §4-4A-211.

**Cut-off time,** §4-4A-106.

**Defined,** §4-4A-103.

**Discharge of underlying obligation,**  
§4-4A-406.

**Erroneous payment orders,**  
§4-4A-205.

**Execution by receiving bank.**

Duty of center to report, §4-4A-304.

Erroneous execution, §4-4A-303.

Executed defined, §4-4A-301.

Execution date defined, §4-4A-301.

Failure to execute, liability for,  
§4-4A-305.

Improper execution, liability for,  
§4-4A-305.

Late execution, liability for, §4-4A-305.

Obligations of receiving bank,  
§4-4A-302.

**Misdescription.**

Beneficiary, §4-4A-207.

Beneficiary's bank, §4-4A-208.

Intermediary bank, §4-4A-208.

**Objection to debit of customer's account,** §4-4A-505.

**Obligation of beneficiary's bank,**  
§4-4A-404.

**Obligation of sender to pay receiving bank,** §4-4A-402.

**Order in which payment orders may be charged to account,** §4-4A-504.

**Order of withdrawals from account,**  
§4-4A-504.

**Payment by beneficiary's bank to beneficiary,** §4-4A-405.

**Payment by originator to beneficiary,** §4-4A-406.

**Payment by sender to receiving bank,** §4-4A-403.

**Payment date defined,** §4-4A-401.

**Preclusion of objection to debit of customer's account,** §4-4A-205.

**Rejection,** §§4-4A-210, 4-4A-212.

**Security procedure defined,**  
§4-4A-201.

**Time of acceptance,** §4-4A-209.

**Time received,** §4-4A-106.

**PAYMENT ORDERS, FUNDS****TRANSFERS —Cont'd**

**Transmission through communication system,**  
§4-4A-206.

**Transmission through funds-transfer system,** §4-4A-206.

**Unauthorized payment orders,**  
§4-4A-204.

**Verified payment orders,** §§4-4A-202,  
4-4A-203.

**PAY PER CALL.**

**Advertising,** §4-98-104.

**Citation of chapter,** §4-98-101.

**Consumer remedies,** §4-98-105.

**Definitions,** §4-98-102.

**Information and disclosure message,**  
§4-98-103.

**PERFECTION OF SECURITY INTERESTS.****Secured transactions.**

Generally, §§4-9-101 to 4-9-709.

**PERFORMING ARTS SOCIETIES.**

**Copyright royalty collection practices act,** §§4-76-101 to  
4-76-108.

**PERSONAL IDENTIFYING INFORMATION.**

**Consumer protection against computer spyware act,**  
§§4-111-101 to 4-111-105.

Personally identifiable information defined, §4-111-102.

**Defined,** §4-111-102.

**Personal information protection act,**  
§§4-110-101 to 4-110-108.

Action by attorney general.

Violation punishable by, §4-110-108.

Breach of security system.

Duty to disclose.

Person or business acquiring,  
owning, licensing or  
maintaining data including  
personal information,  
§4-110-105.

Definitions, §4-110-103.

Destruction of records containing  
personal information.

Duty of person or business, methods,  
§4-110-104.

Exemptions from provision of chapter,  
§4-110-106.

Findings, intent and purpose of  
general assembly, §4-110-102.

## **PERSONAL IDENTIFYING INFORMATION —Cont'd**

### **Personal information protection act —Cont'd**

- Notification of breach of security system, §4-110-105.
- Security procedures and practices.
  - Duty of person or business acquiring, owning or licensing personal information, §4-110-104.
- Short title, §4-110-104.
- State or federal law providing greater protection.
  - Exemption of person or business regulated by, §4-110-106.
- Waiver of provision of chapter.
  - Void, unenforceable, contrary to public policy, §4-110-107.

## **PERSONAL PROPERTY.**

### **Corporations.**

- Defense of ultra vires, §4-26-205.

### **Leases.**

- Commercial code leases, §§4-2A-101 to 4-2A-532.

### **Limited liability companies.**

- Foreign limited liability companies.
  - Transactions not constituting transacting business, §4-32-1008.
- Nature of limited liability company interest, §4-32-703.

### **Limited partnerships.**

- Transferable interests.
  - Status as personal property, §4-47-701.

### **Nonprofit corporations.**

- Powers as to, §4-28-209.

### **Unincorporated nonprofit associations.**

- Generally, §§4-28-601 to 4-28-636.

## **PETITIONS.**

### **Limited liability companies.**

- Secretary of state's refusal to file documents, §4-32-1302.

### **Limited partnerships.**

- Order for signature or unsigned filing of document, §4-47-205.

### **PET LEMON LAW, §4-97-105.**

## **PETROLEUM PRODUCTS TANKS.**

### **Petroleum products franchises.**

- General provisions, §§4-72-401 to 4-72-503.

## **PETS.**

### **Definitions.**

- Retail pet stores, §4-97-103.

## **PETS —Cont'd**

### **Lemon law, §4-97-105.**

### **Retail pet stores, §§4-97-101 to 4-97-109.**

- Animal identification number, §4-97-105.
- Applicability of act.
  - Liberal construction, §4-97-109.
- Certification requirements, §4-97-105.
- Citation of title, §4-97-101.
- Consumer guarantees, §4-97-105.
  - "Consumer" defined, §4-97-103.
- Contract requirements, §4-97-105.
- Definitions, §4-97-103.
- Enforcement of act, §4-97-106.
- Euthanasia.
  - Defined, §4-97-103.
- Lawful disposition of animals, §4-97-107.
- Inspection of premises and records, §4-97-108.
- Legislative intent, §4-97-102.
  - Liberal construction of act, §4-97-109.
- Lemon law, §4-97-105.
- Medical fitness of animal, §4-97-105.
- Notice requirements.
  - Complaints regarding treatment or care of animals, §4-97-108.
- Public policy declaration, §4-97-102.
  - Liberal construction of act, §4-97-109.
- Recordkeeping requirements, §4-97-108.
  - "Records" defined, §4-97-103.
- Registration.
  - Fee, §4-97-104.
  - Generally, §4-97-104.
  - Required, §4-97-104.
- Reimbursement for veterinary services, §4-97-105.
- Rulemaking authority, §4-97-106.
- Title of act, §4-97-101.
- Unlawful disposition of animals, §4-97-107.

## **PHARMACISTS AND PHARMACIES.**

### **Fair disclosure of state funded payments for pharmacists' services act, §§4-88-801 to 4-88-804.**

- Definitions, §4-88-802.
- Itemizations required, §4-88-803.
- Title of act, §4-88-801.
- Violations as unfair trade practices, §4-88-804.

### **State funded payments for pharmacists' services.**

- Fair disclosure, §§4-88-801 to 4-88-804.

**PHILANTHROPIC****ORGANIZATIONS.**

**Nonprofit corporations (1987),**  
§§4-28-201 to 4-28-225.

**Nonprofit corporations (1993),**  
§§4-33-101 to 4-33-1707.

**PHISHING.**

**Consumer protection against  
computer spyware act,**  
§§4-111-101 to 4-111-105.

**Defined,** §4-111-102.

**PHONE CHECKS.**

**Telemarketers submitting check for  
payment.**

Express consent of consumer required,  
§4-99-203.

**PHYSICAL FITNESS CENTERS.****Health spas.**

Consumer protection, §§4-94-101 to  
4-94-109.

**PHYSICIANS AND SURGEONS.****Prescription drugs.**

Distribution drug samples,  
§§4-117-101, 4-117-102.

**PIN.**

**Consumer protection against  
computer spyware act,**  
§§4-111-101 to 4-111-105.

Personally identifiable information  
defined, §4-111-102.

**Personal information protection act,**  
§§4-110-101 to 4-110-108.

**PLEADINGS.****Limited partnerships.**

Derivative actions, §4-47-1004.

**PONZI SCHEMES.**

**Deceptive trade practices,** §4-88-109.

**POWER OF ATTORNEY.****Limited liability companies.**

Executing documents under powers of  
attorney, §4-32-204.

**Limited partnerships.**

Signing of records, §4-47-204.

**PREEMPTION.**

**Price gouging during emergencies,**  
§4-88-305.

**PREPAID GIFT CARDS.**

**Fair gift card act,** §§4-88-701 to  
4-88-706.

**PRESCRIPTION DRUGS.****Drug samples.**

Distribution, §§4-117-101, 4-117-102.

**PRESCRIPTION DRUGS —Cont'd****Physicians and surgeons.**

Drug samples, distribution of,  
§4-117-102.

**PRESENTMENT.****Documentary drafts.**

Bank deposits and collections.

Duty to send for presentment,  
§4-4-501.

On arrival drafts, §4-4-502.

**Negotiable instruments.**

Excused presentment, §4-3-504.

Notice of dishonor, §4-3-504.

Presentment, defined, §4-3-501.

Rules governing dishonor, §4-3-501.

Warranties, §4-3-407.

**PRESUMPTIONS.****Assumed names.**

Business under assumed name.

Certificate setting forth name.

Evidentiary effect, §4-70-205.

**Commercial code,** §4-1-206.

**Contracts.**

Sale of goods.

Breaches with respect to accepted  
goods, §4-2-607.

**Investment securities,** §4-8-114.

**Lemon law.**

Reasonable attempts to repair,  
§4-90-410.

**Limited liability company  
dissolution.**

Filing of articles of dissolution  
constitutes notice, §4-32-904.

**Monopolies and restraint of trade.**

Automobile dealer's anti-coercion act.

Exclusive financing agreements.

Threats presumed made at  
direction of manufacturer or  
distributor, §4-75-410.

**Negotiable instruments.**

Notice of dishonor, §4-3-505.

**Weights and measures.**

Weighing and measuring devices.

Use for business purposes,  
§4-18-326.

**PRICE GOUGING IN**

**EMERGENCIES,** §§4-88-301 to  
4-88-305.

**Definitions,** §4-88-302.

**Penalties, remedies and  
enforcement,** §4-88-304.

**Preemption,** §4-88-305.

**Prohibited practices,** §4-88-303.

**Taking unfair advantage of  
consumers,** §4-88-301.

**PRINTS.****Definitions.**

Sales of fine prints, §4-73-301.

**Sales of fine prints.**

Applicability of provisions, §4-73-302.

Certificate of information.

Furnishing to purchaser, §4-73-304.

Information required on certificate,  
§4-73-305.

Definitions, §4-73-301.

Liability of seller for violations,  
§4-73-303.

Violations of provisions.

Liability of seller, §4-73-303.

**PRIORITIES.**

**Investment securities,** §4-8-511.

**Limited partnerships.**

Disposition of assets at dissolution,  
§4-47-812.

**Secured transactions.**

Generally, §§4-9-101 to 4-9-709.

Perfection and priority of security  
interests, §§4-9-301 to 4-9-342.

**PRIVATE FOUNDATIONS.****Nonprofit corporation (1993).**

Articles of incorporation.

Default provisions, §4-33-150.

**PRIVITY.****Consumer protection.**

Warranties.

Breach of warranty, §4-86-101.

**Products liability,** §4-86-102.**PRIZES.****Advertising.**

Bank night or buck night.

Certain kinds of advertising made  
lawful, §4-70-102.

**Promotion, regulation,** §§4-102-101 to  
4-102-109.

Award of prize required, §4-102-107.

Definitions, §4-102-102.

Disclosures, §4-102-106.

Exempted entities, §4-102-104.

Home solicitation act applicability,  
§4-102-109.

Inapplicability of provisions,  
§4-102-104.

Legislative findings and intent,  
§4-102-101.

Sponsors, prohibited practices,  
§4-102-105.

Telephonic communications,  
§4-102-108.

Violations, §4-102-103.

**PRIZES —Cont'd****Telephone offer of prize to consumer.**

Dispatching courier to consumer's  
home to collect fees or costs  
prohibited, §4-99-202.

**PRODUCTS LIABILITY,** §4-86-102.

**Consumer protection,** §4-86-102.

**Privity,** §4-86-102.

**PROFESSIONAL CORPORATIONS.****Amendments.**

Articles of incorporation, §4-29-210.

**Appeals.**

Suspension or revocation of certificate  
of registration, §4-29-212.

**Applicability of business  
corporation act,** §4-29-204.

**Applicability of provisions.**

Other professional corporation laws,  
§4-29-203.

**Assignment.**

Certificates of registration, §4-29-210.

**Business corporation act.**

Application, §4-29-204.

**Certificate of registration.**

Amendments, §4-29-210.

Annual renewal, §4-29-210.

Assignment, §4-29-210.

Change of location.

Amendment of certificate, §4-29-210.

Fees, §4-29-210.

Annual renewal, §4-29-210.

Posting of certificate, §4-29-210.

Suspension or revocation, §4-29-210.

Appeals, §4-29-212.

Hearings, §4-29-211.

Notice, §4-29-211.

**Citation of act,** §4-29-201.

**Construction and interpretation.**

Business corporation act.

Applicability of business corporation  
act, §4-29-204.

Optional nature of subchapter,  
§4-29-203.

**Conversion to business corporation,**  
§4-29-204.

**Corporate name,** §4-29-207.

**Definitions,** §4-29-202.

**Directors.**

License requirements, §4-29-208.

**Employees.**

License requirements, §4-29-209.

**Formation,** §4-29-206.

**Incorporation,** §4-29-206.

**Liability.**

Limitations on professional liability.

Persons associated with professional  
corporations, §4-29-101.

**PROFESSIONAL CORPORATIONS**

—Cont'd

**Liability** —Cont'd

Professional relationships unaltered by provisions, §4-29-205.

**Licenses.**

Employees, §4-29-209.

Officers, directors and shareholders, §4-29-208.

**Names.**

Corporate name, §4-29-207.

**Notice.**

Certificate of registration.

Suspension or revocation, §4-29-211.

**Officers.**

License requirements, §4-29-208.

**Professional relationships.**

Effect of act upon applicable law, §4-29-205.

**Short title, §4-29-201.****Stock and stockholders.**

Death or disqualification of shareholder, §4-29-213.

License requirements, §4-29-208.

Shares of deceased or disqualified shareholder, §4-29-213.

**Title of act.**

Short title, §4-29-201.

**PROFESSIONAL SERVICE LIMITED LIABILITY COMPANIES.****Executors, administrators or other fiduciary capacity.**

Company engaged in practice of law acting as, §4-32-307.

**Liability of individuals for individual's acts or omissions, §4-32-308.****Liability of member, manager or employee for others acts or omissions, §4-32-308.****Limited liability companies generally, §§4-32-1301 to 4-32-1316.****Names, §4-32-103.****Nonprofessional employees and agents rendering services, §4-32-306.****Repeal of laws in conflict, §4-32-1316.****Requirements for rendering professional service, §4-32-306.****PROFESSIONAL TELEMARKETERS.****Solicitation of charitable contributions.**

Defined, §4-28-401.

Registration required, §4-28-411.

**PROMISSORY NOTES.****Attorneys' fees.**

Allowable provision in promissory note for attorneys' fees, §4-56-101.

**Secured transactions.**

Restrictions on certain assignments, §4-9-408.

**PROMOTIONAL SOLICITATION SALES.****General provisions, §§4-95-101 to 4-95-108.****PROSECUTING ATTORNEYS.****Going out of business sales.**

Enforcement of chapter, §4-74-104.

**Home solicitation sales.**

Enforcement of provisions, §4-89-106.

**PUBLICATION.****Limited liability companies.**

Notice to unknown claimants of dissolved companies, §4-32-908.

**PUBLIC BENEFIT CORPORATIONS.****Nonprofit corporations (1993).**

Election to be governed by nonprofit corporation law, §4-33-1707.

**PUBLIC FUNDS.****Elder and disabled victims fund, §4-88-207.****Spyware monitoring fund.**

Consumer protection against computer spyware act.

Fines and penalties paid into, use of fund, §4-111-105.

**PUBLIC UTILITIES.****Construction and interpretation.**

Transmitting utilities.

Supplemental nature of provisions, §4-19-103.

**Definitions.**

Transmitting utilities, §4-19-102.

**Secured transactions.**

Transmitting utilities.

Filing requirements, §4-19-104.

**Transmitting utilities.**

Citation of act.

Short title, §4-19-101.

Definitions, §4-19-102.

Secured transactions.

Filing requirements, §4-19-104.

Supplemental nature of chapter, §4-19-103.

Title of act.

Short title, §4-19-101.

**PUNITIVE DAMAGES.****Automobile dealer's anti-coercion act, §4-75-412.**

**PUNITIVE DAMAGES —Cont'd****News furnishing.**

Discrimination in rates or service,  
§4-75-503.

**Unfair trade practices, §4-75-211.****PUPPY LEMON LAW, §4-97-105.****PURCHASE MONEY SECURITY INTEREST.****Secured transactions.**

Burden of establishing security  
interest, §4-9-103.

Perfection and priority of security  
interests, §4-9-324.

**PYRAMID SCHEMES.****Deceptive trade practices, §4-88-109.****R****RABIES.****Retail pet stores.**

General provisions, §§4-97-101 to  
4-97-109.

**RAILROADS.****Freight.**

Freight and parcel delivery services.

Interest on deposits for, §4-86-104.

**Interest.**

Freight and parcel delivery services.

Interest on deposits, §4-86-104.

**REAL ESTATE BROKERS AND SALESPERSONS.****Products liability, exclusion,  
§4-86-102.****REAL PROPERTY.****Corporations.**

Defense of ultra vires, §4-26-205.

**Limited liability companies.**

Acquired in name of company,  
§4-32-701.

Foreign limited liability companies.

Transactions not constituting  
transacting business,  
§4-32-1008.

Transfer, §4-32-702.

**Nonprofit corporations.**

Powers as to, §4-28-209.

**Secured transactions.**

Rights and duties after default.

Security agreement covering real  
property, §4-9-604.

**Statute of frauds.**

Leases, estates, etc., to be in writing,  
§4-59-102.

Sale of land, §4-59-101.

**REAL PROPERTY —Cont'd****Unincorporated nonprofit  
associations.**

Generally, §§4-28-601 to 4-28-636.

**REBATES.****Monopolies and restraint of trade.**

Unfair practices.

Secret payment prohibited,  
§4-75-208.

Special rebates prohibited,  
§4-75-207.

**RECEIPTS.****Warehouse receipts.**

General provisions, §§4-59-401 to  
4-59-406.

**RECEIVERS.****Limited partnerships.**

Transferable interests.

Creditor's rights, §4-47-703.

**Nonprofit corporations (1993).**

Judicial dissolution, §4-33-1432.

**Water authorities.**

Bond issues, default, §4-35-303.

**RECORDATION OF DOCUMENTS.****Partnerships.**

Statements, §4-46-105.

**RECORDS.****Charitable contributions.**

Document requirements generally,  
§4-28-410.

**Charitable organizations soliciting  
contributions, §4-28-403.****Corporations.**

Effective time and date of documents,  
§4-27-123.

Fees, §4-27-122.

Filing of corporate documents,  
§§4-26-1201, 4-27-120.

Appeal from refusal to file,  
§4-27-126.

Correcting filed document,  
§4-27-124.

Duty of secretary of state, §4-27-125.

Evidentiary effect of copy, §4-27-127.

Forms, §4-27-121.

**Inspections.**

Court-ordered inspection,  
§4-27-1604.

Stock and stockholders, §4-27-1602.

Scope of inspection rights,  
§4-27-1603.

Requirements generally for  
recordkeeping, §§4-26-715,  
4-27-1601.

**RECORDS —Cont'd****Corporations —Cont'd**

Stock and stockholders.

Closing of transfer books and fixing record date, §§4-26-702, 4-27-707.

**Limited liability companies.**

Inspection by members, §4-32-405.

Required records, §4-32-405.

**Limited partnerships.**

Correcting of filed records, §4-47-207.

Delivery to and filing by secretary of state, §4-47-204.

General partners.

Right to information, §4-47-407.

Information to be kept at designated office, §4-47-111.

Liability for false information, §4-47-208.

Limited partners.

Right to inspect and request information, §4-47-304.

Signing of records, §§4-47-204, 4-47-205.

**Nonprofit corporations.**

Books and accounting records.

Keeping, §4-28-218.

**Partnerships.**

Rights and duties as to books and records, §4-46-403.

**Service contracts.**

Recordkeeping by provider, §4-114-108.

**Trademarks, §4-71-208.****REDEMPTION.****Corporations.**

Stock and stockholders.

Cancellation of redeemable shares by redemption or purchase, §4-26-614.

Reduction of stated capital in certain cases, §4-26-615.

Restriction on redemption or purchase of redeemable shares, §4-26-613.

**Nonprofit corporations (1993).**

Members' rights and obligations, §4-33-610.

**Secured transactions.**

Default on security agreement.

Right to redeem collateral, §4-9-623.

**REFUND ANTICIPATION LOANS,**

§§4-116-101 to 4-116-108.

**Applicability of provisions,**

§4-116-103.

**Application disclosures, §4-116-105.****Consumer remedies, §4-116-108.****REFUND ANTICIPATION LOANS**

—Cont'd

**Definitions, §4-116-102.**

**Fee schedules and disclosures to be posted, §4-116-104.**

**Oral disclosures, §4-116-106.**

**Penalties for violations, §4-116-108.**

**Prohibited acts, §§4-116-103, 4-116-107.**

**Title of act, §4-116-101.**

**REFUNDS.**

**Lemon law, §4-90-407.**

**REGISTERED AGENTS, §§4-20-101 to 4-20-118.**

**Addresses listed in filings, §4-20-104.**

**Application of provisions, §4-20-116.**

**Appointment filings, §4-20-105.**

Nonfiling entity or nonqualified foreign entity, §4-20-112.

**Change of agent by entity, §4-20-108.**

**Change of name or address of agent, §4-20-109.**

Commercial registered agent, §4-20-110.

**Commercial registered agents.**

Change of name, address or type of organization, §4-20-110.

List of filings, §4-20-106.

Termination of listing, §4-20-107.

**Definitions, §4-20-102.**

**Duties of agent, §4-20-114.**

**Electronic signatures in global and national commerce act, relationship, §4-20-117.**

**Fees, §4-20-103.**

**Jurisdiction over represented entity not established, §4-20-115.**

**List of filings, §4-20-105.**

Commercial registered agents, §4-20-106.

Termination of listing, §4-20-107.

**Method of service on, §4-20-113.**

**Nonfiling entity or nonqualified foreign entity.**

Appointment of agent, §4-20-112.

**Resignation of agent, §4-20-111.**

**Savings clause, §4-20-118.**

**Service of process on agents, §4-20-113.**

**Title of act, §4-20-101.**

**Venue over represented entity not determined, §4-20-115.**

**REGISTRATION.**

**Charitable organization prior to solicitation, §4-28-402.**

**REGISTRATION —Cont'd****Connect Arkansas broadband program.**

Registration of service providers,  
§4-113-105.

**Foreign limited liability companies,**  
§§4-32-1001 to 4-32-1008.**Fund-raising counsel,** §4-28-406.**Health spas,** §4-94-106.**Investment securities.**

Rights with respect to registered  
owners, §4-8-207.

Signature of registrar.

Effect, §4-8-208.

Transfer.

Duty of issuer to register transfer,  
§4-8-401.

**Limited liability companies.**

Foreign limited liability companies,  
§§4-32-1001 to 4-32-1008.

**Paid solicitor, solicitation of  
charitable contribution,**  
§4-28-407.**Pets.**

Retail pet stores.

Generally, §4-97-104.

**Professional telemarketers soliciting  
charitable contributions,**  
§4-28-411.**Service contracts.**

Registration of providers, §4-114-104.

**Telephonic sellers,** §4-99-104.

Exemption, §4-99-106.

Information required to be filed,  
§4-99-105.

Exemption information, §4-99-106.

Soliciting prospective purchaser on  
behalf of unregistered seller,  
§4-99-110.

**REHABILITATIVE SERVICES**

**CORPORATIONS,** §§4-34-101 to  
4-34-107.

**Applicable laws,** §4-34-106.**Conversion from nonprofit  
corporation,** §4-34-105.**Creation, purposes,** §4-34-101.**Incorporation,** §4-34-104.**Perpetual succession,** §4-34-106.**Property taxes, obligation to pay,**  
§4-34-107.**RELIGION.****Corporations.**

Religious corporations.

Fees of secretary of state, §4-28-102.

**Insurance.**

Life insurance policy naming religious  
institution, organization, etc., as  
beneficiary, §4-28-103.

**RELIGION —Cont'd****Nonprofit corporations.**

Articles of incorporation.

Inclusion of certain provisions in  
article, §4-28-207.

Religious, literary, benevolent, etc.,  
corporations.

Fees, §4-28-102.

**RELIGIOUS ORGANIZATIONS.****Constitutional protections,** §4-33-180.**Nonprofit corporations.**

Articles of incorporation.

Default provisions, §4-33-150.

Constitutional protections, §4-33-180.

Election to be governed by nonprofit  
corporation law, §4-33-1707.

Limitations on merger, §4-33-1102.

Purchase of memberships, §4-33-622.

Purpose of organization, §4-33-301.

Removal of directors, §4-33-808.

Removal of directors by judicial  
proceeding, §4-33-810.

Repeal of conflicting acts, §4-33-1705.

**REMEDIES.****Consumer credit.**

Equal consumer credit act.

General provisions, §§4-87-101 to  
4-87-105.

**Corporations.**

Dissolution.

Corporate action and remedies after  
dissolution, §4-26-1104.

**Franchises.**

Franchisee's remedies, §4-72-208.

Misleading and fraudulent schemes.

Violation of provisions.

Recovery available, §4-72-208.

Petroleum products franchises.

Dealer-supplier or distributor  
franchises.

Cancellation, termination or  
refusal to renew, §4-72-503.

Supplier-distributor franchises.

Cancellation, termination or  
refusal to renew, §4-72-403.

**Milk and milk products.**

Unfair trade practices, §4-75-809.

**RENT.****Leases, UCC.**

Action by lessor for rent, §4-2A-529.

Proof or market rent, §4-2A-507.

**RENTAL-PURCHASE  
AGREEMENTS.****Advertising,** §4-92-107.**Agreements.**

Nature, §4-92-104.

**RENTAL-PURCHASE AGREEMENTS**

—Cont'd

**Agreements —Cont'd**

Prohibited provisions, §4-92-105.

Reinstatement, §4-92-106.

Required provisions, §4-92-105.

**Citation of chapter, §4-92-101.****Damages.**

Liability of lessor, §4-92-103.

**Definitions, §4-92-102.****Liability.**

Lessor, §4-92-103.

**Title of chapter, §4-92-101.****RENTAL VEHICLES.****Prohibited transfers, §4-100-103.**

Definitions, §4-100-101.

Violations, §4-100-102.

**Terminal rental adjustment clauses, §4-2A-110.****REPAIRS.****Aftermarket crash parts, §§4-90-301 to 4-90-307.**

Defined, §4-90-302.

Installer.

Defined, §4-90-302.

Insurance requirements, §4-90-307.

Insurer.

Defined, §4-90-302.

Legislative intent, §4-90-301.

Nonoriginal equipment manufacturer  
aftermarket crash part.

Defined, §4-90-302.

Penalties, §4-90-303.

Repair estimates, §4-90-305.

Repair facility.

Defined, §4-90-302.

Required identification, §4-90-304.

Warranty repairs, §4-90-306.

**Estimates, §4-90-305.****Lemon law.**

Documentation, §4-90-411.

Extension of time to repair.

War, invasion, strike, etc., §4-90-410.

Presumption of reasonable attempts to  
repair, §4-90-410.

Refusal to make, §4-90-411.

Required warranty repairs, §4-90-405.

Failure to make, §4-90-406.

**Odometer regulations, §§4-90-201 to 4-90-207.****Repair estimates, §4-90-305.****REPLEVIN.****Leases, commercial code.**Replevy of goods, §§4-2A-508,  
4-2A-521.**REPORTS.****Charitable organizations soliciting contributions, §4-28-403.****Collection agencies.**

Credit reporting disclosures.

General provisions, §§4-93-101 to  
4-93-104.**Consumer credit.**

Credit reporting disclosures.

General provisions, §§4-93-101 to  
4-93-104.Credit report security freezes,  
§§4-112-101 to 4-112-114.**Cooperative associations.**

Annual reports required, §4-30-114.

**Credit reporting disclosures.**General provisions, §§4-93-101 to  
4-93-104.**Credit report security freezes, §§4-112-101 to 4-112-114.****Limited liability partnerships.**

Annual report.

Required, filing, §4-46-1003.

**Limited partnerships.**Annual report to secretary of state,  
§4-47-210.**Pets.**

Retail pet stores.

Reporting requirements, §4-97-104.

**REPOSE, STATUTE OF.****Banking.**Objections to debiting of accounts,  
§4-4A-505.**REPOSSESSION OF PERSONAL PROPERTY.****Secured transactions.**

Default, §4-9-609.

Disposition after, §4-9-610.

Proceeds, §4-9-615.

Rights of transferee, §4-9-617.

Surplus or deficiency of proceeds,  
§4-9-616.Notification before disposition,  
§4-9-611.

Contents and form, §4-9-613.

Form and content.

Consumer goods transactions,  
§4-9-614.

Timeliness, §4-9-612.

**REPUDIATION.****Leases, UCC.**Anticipatory repudiation, §§4-2A-402,  
4-2A-403.

Insecurity.

Failure to provide adequate  
assurance of performance,  
§4-2A-519.

**REPUDIATION —Cont'd****Leases, UCC —Cont'd**

Lessor's remedies, §4-2A-523.

**Sale of goods, UCC.**

Anticipatory repudiation, §§4-2-610, 4-2-611.

Proof of market price, §4-2-723.

Buyer's repudiation.

Enumeration of seller's remedies, §4-2-703.

Seller's remedies.

Buyer's remedies enumerated, §4-2-711.

**RESCISSION.****Leases, UCC, §4-2A-208.**

Effect on rights and remedies, §4-2A-505.

**Sale of goods, UCC, §4-2-209.****RESTAURANTS.****Franchises.**

Procedural fairness.

Applicability of provisions, §4-72-603.

Commencement of civil action or arbitration proceeding, §4-72-602.

Definitions, §4-72-601.

**RESTITUTION.****Checks.**

Insufficient funds, §§4-60-101 to 4-60-103.

**Monopolies and restraint of trade.**

Actions by attorney general, §4-75-315.

Unfair practices, §4-75-212.

**Sale of goods, UCC.**

Buyer's remedies, §4-2-718.

**Service contracts.**

Enforcement of provisions, §4-114-111.

**RETAIL PET STORES, §§4-97-101 to 4-97-109.****RICE.****Security interest in farm products.**

Failure to disclose person with, §4-56-102.

**RIGHT OF ENTRY.****Weights and measures.**

State plant board.

Special police powers, §4-18-313.

**RISK OF LOSS.****Sales under UCC.**

Action against third party for injury to goods, §4-2-722.

Buyer's right of inspection.

Passage of risk not shifted, §4-2-513.

Casualty to identified goods, §4-2-613.

**RISK OF LOSS —Cont'd****Sales under UCC —Cont'd**

Delivery "ex-ship," §4-2-322.

Effect of breach, §4-2-510.

In absence of breach, §4-2-509.

Sale on approval, §4-2-327.

**ROYALTIES.****Copyright royalty collection**

**practices act, §§4-76-101 to 4-76-108.**

**RURAL FIRE PROTECTION**

**CORPORATIONS, §§4-34-103 to 4-34-107.**

**Conversion of nonprofit corporation into corporation authorized by chapter, §4-34-105.**

**Creation authorized, public body and body corporate and politic, purposes, §4-34-103.**

**Filing for incorporation, §4-34-104.**

**Nonprofit corporation act of 1993.**

Corporation authorized by chapter subject to, §4-34-106.

**Perpetual succession, §4-34-106.**

**Property taxes, obligation to pay, §4-34-107.**

**S**

**SALE OF GOODS, UCC, §§4-2-101 to 4-2-725.**

**Acceptance of goods.**

Revocation of acceptance, §4-2-608.

What constitutes, §4-2-606.

**Action for price.**

Seller's remedies, §4-2-709.

**Affirmations.**

Express warranties, §4-2-313.

**Antecedent breach.**

Effect of "cancellation" or "rescission" on claims, §4-2-720.

**Anticipatory repudiation, §4-2-610.**

Proof of market price, §4-2-723.

Retraction, §4-2-611.

**Approval.**

Sale on approval, §§4-2-326, 4-2-327.

**Assignment of rights, §4-2-210.****Assortment of goods.**

Buyer's option, §4-2-311.

**Assurance of performance.**

Right to adequate assurance, §4-2-609.

**Auction sales, §4-2-328.****Breach of obligations.**

Antecedent breach.

Effect of "cancellation" or "rescission" on claims, §4-2-720.

**SALE OF GOODS, UCC —Cont'd****Breach of obligations —Cont'd**

Installment contracts, §4-2-612.

Limitation of actions, §4-2-725.

Notice requirements, §4-2-607.

**Burden of proof.**

Breaches with respect to accepted goods, §4-2-607.

**Cancellation of contract.**

Buyer's remedies.

Enumerated, §4-2-711.

Seller's remedies, §4-2-703.

**C. & F. terms, §§4-2-320, 4-2-321.****Casualty to identified goods,**  
§4-2-613.**C.I.F. terms, §§4-2-320, 4-2-321.****Citation of article, §4-2-101.****Collateral contracts.**Remedies for breach not impaired,  
§4-2-701.**Cooperation respecting  
performance, §4-2-311.****Course of dealing.**

Implied warranties, §4-2-314.

**Cover.**

Buyer's procurement of substitute goods, §4-2-712.

**Credit.**

Confirmed credit, §4-2-325.

Letters of credit, §4-2-325.

**Creditor's rights and remedies.**

Sale on approval and sale or return transactions, §4-2-326.

Sold goods.

Rights of seller's creditors, §4-2-402.

**Cure.**

Improper tender or delivery of goods.

Seller's right to cure, §4-2-508.

**Damages.**

Acceptance of goods.

Buyer's damages for breach in regard to accepted goods,  
§4-2-714.

Antecedent breach.

Effect of "cancellation" or "rescission" on claims, §4-2-720.

Consequential damages.

Buyer's consequential damages,  
§4-2-715.

Contractual limitations, §4-2-719.

Cover by buyer.

Right to cover, §4-2-712.

Deduction from price, §4-2-717.

Delivery of goods.

Buyer's damages for nondelivery,  
§4-2-713.

Incidental damages.

Buyer's incidental damages,  
§4-2-715.**SALE OF GOODS, UCC —Cont'd****Damages —Cont'd**

Incidental damages —Cont'd

Recovery by person in position of seller, §4-2-707.

Seller's incidental damages,  
§4-2-710.

Limitation, §4-2-718.

Liquidation, §4-2-718.

Nonacceptance of goods.

Seller's damages, §4-2-708.

Repudiation by buyer.

Seller's damages, §4-2-708.

Repudiation by seller.

Buyer's damages, §4-2-713.

Resale of goods by seller, §§4-2-703,  
4-2-706.

Warranty breaches, §4-2-714.

**Definitions.**

Agreement, §4-2-106.

Banker's credit, §4-2-325.

Between merchants, §4-2-104.

Buyer, §4-2-103.

Cancellation, §4-2-106.

Commercial unit, §4-2-105.

Confirmed credit, §4-2-325.

Conforming to contract, §4-2-106.

Contract, §4-2-106.

Contract for sale, §4-2-106.

Cover, §4-2-712.

Entrusting, §4-2-403.

Financing agency, §4-2-104.

Future goods, §4-2-105.

General commercial code definitions,  
§4-1-201.

Goods, §4-2-105.

Identification, §4-2-501.

Index of definitions, §4-2-103.

Installment contract, §4-2-612.

Letter of credit, §4-2-325.

Lot, §4-2-105.

Merchant, §4-2-104.

Overseas, §4-2-323.

Person in position of seller, §4-2-707.

Present sale, §4-2-106.

Receipt, §4-2-103.

Sale, §4-2-106.

Sale on approval, §4-2-326.

Sale or return, §4-2-326.

Seller, §4-2-103.

Termination, §4-2-106.

**Delegation of performance, §4-2-210.****Description of goods.**Express warranties by description,  
§4-2-313.**Detinue of goods.**

Right of buyer, §4-2-716.

**SALE OF GOODS, UCC —Cont'd****Disputed goods.**

Preservation of evidence, §4-2-515.

**Documents against which draft is drawn.**

When deliverable, §4-2-514.

**Entrustors and trustees, §4-2-403.****Evidence.**

Breaches with respect to accepted goods, §4-2-607.

Disputed goods.

Preserving evidence, §4-2-515.

Price.

Admissibility of market quotations, §4-2-724.

Proof of market price, §4-2-723.

**Excludable security and other transactions, §4-2-102.****Exclusive dealings, §4-2-306.****Executory portion of contract.**

Waiver, §4-2-209.

**Extrinsic evidence, §4-2-202.****Failure of seller to deliver.**

Buyer's right to goods, §4-2-502.

**Finality of written expression, §4-2-202.****Financing agencies.**

Shipment of goods.

Drafts paid or purchased by agency.

Rights of agency, §4-2-506.

**Firm offers, §4-2-205.****Fitness for particular purpose.**

Implied warranties, §4-2-315.

Exclusion or modification, §4-2-316.

**Formal requirements, §4-2-201.****Formation of contract.**

Generally, §4-2-204.

Offer and acceptance.

Additional terms in acceptance or confirmation, §4-2-207.

Auctions, §4-2-328.

Firm offers, §4-2-205.

**Good faith purchasers, §4-2-403.****Goods severed from realty, §4-2-107.**

Casualty to identified goods, §4-2-613.

Seller's right not withstanding breach of contract, §4-2-704.

**Identification of goods, §4-2-501.****Improper tender of delivery.**

Buyer's rights on improper delivery, §4-2-601.

**Infringement of enjoyment of goods.**

Warranty against infringement, §4-2-312.

**Insolvency of buyer.**

Remedies of sellers on discovery, §4-2-702.

**SALE OF GOODS, UCC —Cont'd****Insolvency of seller.**

Buyer's right to goods, §4-2-502.

**Inspection of goods.**

Buyer's right, §4-2-513.

Inspection of goods after arrival of goods but before payment is due, §4-2-310.

Payment by buyer before inspection, §4-2-512.

**Installment contracts, §4-2-612.****Insurable interest in goods, §4-2-501.****Interpretation and construction.**

Cancellation.

Effect of term on claims for antecedent breach, §4-2-720.

Delivery of goods.

Absence of specified place for delivery, §4-2-308.

Time for delivery.

Absence of specified time, §4-2-309.

Open price terms, §4-2-305.

Risks.

Allocation or division, §4-2-303.

Shipment of goods.

Time for shipment.

Absence of specified time, §4-2-309.

**Letters of credit, §4-2-325.****Merchantability of goods.**

Implied warranties, §4-2-314.

Exclusion or modification, §4-2-316.

**Minerals.**

Applicability of chapter, §4-2-107.

**Modification, §4-2-209.****Notice.**

Breach of obligations, §4-2-607.

Termination of contract, §4-2-309.

**Obligations of parties.**

Generally, §4-2-301.

**Offer and acceptance, §4-2-206.**

Additional terms in acceptance or confirmation, §4-2-207.

Auctions, §4-2-328.

Firm offers, §4-2-205.

**Oil and gas.**

Applicability of chapter, §4-2-107.

**Open price terms, §4-2-305.****Options respecting performance, §4-2-311.****Output contracts, §4-2-306.****Parol evidence, §4-2-202.****Payment.**

Accepted goods, §4-2-607.

Before inspection, §4-2-512.

By check, §4-2-511.

Confirmed credit, §4-2-325.

**SALE OF GOODS, UCC —Cont'd****Payment —Cont'd****Credit.**

Running of credit, §4-2-310.

Failure of buyer to pay.

Person in position of seller.

Recovery of incidental damages,  
§4-2-707.

Seller's remedies.

Action for price, §4-2-709.

Enumerated, §4-2-703.

Incidental damages, §4-2-710.

Letters of credit, §4-2-325.

Obligation of buyer, §4-2-301.

On arrival of goods, §4-2-321.

Open time for payment, §4-2-310.

Price payable in money, goods, realty,  
etc., §4-2-304.

Tender by buyer, §4-2-511.

When due, §4-2-310.

**Performance.****Assurance.**

Right to adequate assurance,  
§4-2-609.

Cooperation, §4-2-311.

Delegation, §4-2-210.

Generally, §§4-2-501 to 4-2-515.

Generally, §§4-2-501 to 4-2-515.

Options, §4-2-311.

Specific performance.

Right of buyer, §4-2-716.

Substituted performance, §4-2-614.

Suspension until adequate assurance  
or performance, §4-2-609.

**Price.**

Action for price.

Seller's remedies, §§4-2-703, 4-2-709.

Deduction of damages, §4-2-717.

Failure of buyer to pay.

Person in position of seller.

Recovery of incidental damages,  
§4-2-707.

Seller's remedies.

Action for price, §§4-2-703,  
4-2-709.

Incidental damages, §4-2-710.

Net landed weights, §4-2-321.

Open price terms, §4-2-305.

Payable in money, goods, realty, etc.,  
§4-2-304.

Proof of market price, §4-2-723.

Admissibility of market quotations,  
§4-2-724.

**Promises.**

Express warranties, §4-2-313.

**Reclamation of goods.**

Seller's remedies on discovery of  
buyer's insolvency, §4-2-702.

**SALE OF GOODS, UCC —Cont'd****Rejection of goods.****Rightful rejection.**

Buyer's options as to salvage of  
rightfully rejected goods,  
§4-2-604.

Buyer's remedies.

Enumerated, §4-2-711.

Effect, §4-2-602.

Manner, §4-2-602.

Merchant buyer's duties as to  
rightfully rejected goods,  
§4-2-603.

Waiver of buyer's rejections by  
failure to particularize,  
§4-2-605.

**Wrongful rejection.**

Seller's remedies.

Enumerated, §4-2-703.

**Remedies.****Buyer's remedies.**

Acceptance of goods.

Breach in regard to accepted  
goods, §4-2-714.

Collateral contracts.

Remedies for breach unimpaired,  
§4-2-701.

Consequential damages, §4-2-715.

Cover, §4-2-712.

Detinue, §4-2-716.

Fraud, §4-2-721.

Incidental damages, §4-2-716.

Modification or limitation by  
contract, §4-2-719.

Nondelivery of goods, §4-2-713.

Restitution, §4-2-718.

Specific performance, §4-2-716.

Person in position of seller, §4-2-707.

**Seller's remedies.**

Action for price, §4-2-709.

Buyer's insolvency, §4-2-702.

Delivery of goods.

Stoppage in transit or otherwise,  
§4-2-705.

Fraud, §4-2-721.

Generally, §4-2-703.

Identification of goods.

Notwithstanding breach of  
contract, §4-2-704.

Modification or limitation by  
contract, §4-2-719.

Nonacceptance of goods by buyer,  
§4-2-708.

Options and cooperation respecting  
performance.

Additional remedies, §4-2-311.

Repudiation of contract by buyer,  
§4-2-708.

**SALE OF GOODS, UCC —Cont'd**  
**Remedies —Cont'd**

- Seller's remedies —Cont'd
  - Resale of goods, §4-2-706.
  - Salvaging unfinished goods, §4-2-704.

**Repudiation.**

- Anticipatory repudiation, §§4-2-610, 4-2-611.
- Proof of market price, §4-2-723.
- Buyer's repudiation of contract.
  - Enumeration of seller's remedies, §4-2-703.
  - Seller's damages, §4-2-708.
- Seller's repudiation of contract.
  - Buyer's damages, §4-2-713.
  - Buyer's remedies.
    - Enumerated, §4-2-711.

**Repudiation by seller.**

- Buyer's right to goods, §4-2-502.

**Requirements contract, §4-2-306.****Resale of goods.**

- Remedy of person in position of seller, §4-2-707.
- Seller's remedies, §4-2-706.

**Rescission, §4-2-209.****Restitution.**

- Buyer's remedies, §4-2-718.

**Return of goods.**

- Sale or return transactions, §§4-2-326, 4-2-327.

**Risk of loss.**

- Absence of breach, §4-2-509.
- Casualty to identified goods, §4-2-613.
- Effect of breach, §4-2-510.

**Sale on approval transactions, §§4-2-326, 4-2-327.****Sale or return transactions, §§4-2-326, 4-2-327.****Salvaging unfinished goods.**

- Right of seller, §4-2-704.

**Samples of goods.**

- Express warranties by sample, §4-2-313.

**Scope of chapter, §4-2-102.****Seals.**

- Inoperability, §4-2-203.

**Secured transactions.**

- Security interest arising article, §4-9-110.

**Shipment and delivery.**

- C. & F. terms, §§4-2-320, 4-2-321.
  - Bill of lading required in overseas shipments, §4-2-323.
- Casualty to identified goods, §4-2-613.
- C.I.F. terms, §§4-2-320, 4-2-321.
  - Bill of lading required in overseas shipments, §4-2-323.

**SALE OF GOODS, UCC —Cont'd**  
**Shipment and delivery —Cont'd****Condition.**

- Delivery on, §4-2-507.
- Cure by seller of improper tender or delivery, §4-2-508.

**Delay in delivery.**

- Excuse by failure of presupposed conditions, §§4-2-615, 4-2-616.

**Ex-ship delivery, §4-2-322.****F.A.S. terms, §4-2-319.****Financing agency's rights.**

- Drafts paid or purchased by agency, §4-2-506.

**F.O.B. terms, §4-2-319.**

- Bill of lading required in overseas shipments, §4-2-323.

**Improper tender or delivery.**

- Cure by seller, §4-2-508.

**Damages of buyer for nondelivery, §4-2-713.**

- Excuse by failure of presupposed conditions, §§4-2-615, 4-2-616.

**Recovery by buyer, §4-2-712.****Inspection of goods, §§4-2-512, 4-2-513.****Net landed weights, §4-2-321.****No arrival, no sale terms, §4-2-324.**

- Casualty to identified goods, §4-2-613.

**Obligation of seller to transfer and deliver goods, §4-2-301.****Overseas shipments, §4-2-323.****Payment on arrival, §4-2-321.****Place for delivery.**

- Absence of specified place, §4-2-308.

**Refusal of delivery.****Buyer's remedies.**

- Enumerated, §4-2-711.

**Seller's remedies on discovery of buyer's insolvency, §4-2-702.****Reservation.**

- Authority to ship under reservation, §4-2-310.

**Risk of loss.**

- Absence of breach, §4-2-509.
- Effect of breach, §4-2-510.

**Sale on approval transactions, §§4-2-326, 4-2-327.****Sale or return transactions, §§4-2-326, 4-2-327.****Seller's options.**

- Specifications or arrangements relating to shipment, §4-2-311.

**Shipment by seller, §4-2-504.****Under reservation, §4-2-505.****Single lot or several lots, §4-2-307.**

**SALE OF GOODS, UCC —Cont'd****Shipment and delivery —Cont'd**

Stoppage of goods in transit or otherwise.

Remedy of person in position of seller, §4-2-707.

Remedy of seller, §§4-2-703, 4-2-705.

Substituted performance, §4-2-614.

Tender of delivery.

Buyer's rights on improper delivery, §4-2-601.

Cure by seller of improper tender, §4-2-508.

Effect of seller's tender, §4-2-507.

Excuse by failure of presupposed conditions, §§4-2-615, 4-2-616.

Manner of seller's tender, §4-2-503.

Recovery by buyer where tender improper, §4-2-712.

Time for shipment or delivery.

Absence of specified time, §4-2-309.

Warranty of condition on arrival, §4-2-321.

Withholding delivery.

Seller's remedies, §4-2-703.

**Specific performance.**

Right of buyer, §4-2-716.

**Statute of frauds, §4-2-201.****Statute of limitations, §4-2-725.****Substituted performance, §4-2-614.****Termination of contract.**

Contracts of indefinite duration, §4-2-309.

Definition of "termination," §4-2-106.

Notice of termination, §4-2-309.

**Third-party actions.**

Who can sue third parties for injury to goods, §4-2-722.

**Timber.**

Applicability of chapter, §4-2-107.

**Title of article.**

Short title, §4-2-101.

**Title to goods.**

Passing of title, §4-2-401.

Power to transfer title, §4-2-403.

Reservation for security, §4-2-401.

Warranty of title, §4-2-312.

**Transfer of goods.**

Requisites, §4-2-105.

**Unconscionability, §4-2-302.****Unfinished goods.**

Seller's right to salvage, §4-2-704.

**Usage of trade.**

Implied warranties, §4-2-314.

**Waiver of executory portion of contract, §4-2-209.****Warranties.**

Damages for breach, §4-2-714.

**SALE OF GOODS, UCC —Cont'd****Warranties —Cont'd**

Express warranties.

Cumulation and conflict, §4-2-317.

Exclusions, §4-2-316.

Generally, §4-2-313.

Modification, §4-2-316.

Implied warranties.

Course of dealing or usage of trade, §4-2-314.

Cumulation and conflict, §4-2-317.

Exclusions, §4-2-316.

Fitness for particular purpose, §4-2-315.

Exclusion or modification, §4-2-316.

Merchantability, §4-2-314.

Exclusion or modification, §4-2-316.

Modification generally, §4-2-316.

Infringement of enjoyment of goods.

Warranty of title and against infringement, §4-2-312.

Title.

Warranty of title and against infringement, §4-2-312.

**SALES.****Agents.**

Sales representatives.

General provisions, §§4-70-301 to 4-70-306.

**Cigarettes and tobacco products.**

Licenses, §4-75-707.

Unfair cigarette sales, §§4-75-701 to 4-75-714.

**Commercial code.**

Sale of goods, §§4-2-101 to 4-2-725.

**Consumer protection.**

Warranties.

Breach of warranty.

Liability, §4-86-101.

**Contracts.**

Sale of goods, §§4-2-101 to 4-2-725.

**Door-to-door sales.**

General provisions, §§4-89-101 to 4-89-110.

**Franchises.**

Definition of sale, §4-72-202.

Notice, §4-72-205.

**Going out of business sales,**

§§4-74-101 to 4-74-111.

**Home solicitation sales, §§4-89-101 to 4-89-110.****Leases.**

Commercial code.

Sale of goods by lessee, §4-2A-305.

**Lemon law.**

Resale of returned nonconforming vehicle, §4-90-412.

**SALES —Cont'd****Letters of credit.**

Contracts for sale of goods, §4-2-325.

**Mail and telephone solicitation sales, §§4-95-101 to 4-95-108.****Monopolies and restraint of trade.**

Unfair cigarette sales, §§4-75-701 to 4-75-714.

**Unfair practices.**

Sale at less than cost or with intent to injure competitors, §4-75-209.

**Motor vehicles.**

Arbitration and forum selection clauses in contracts, §4-75-413.

**Representatives.**

General provisions, §§4-70-301 to 4-70-306.

**Sale of goods, §§4-2-101 to 4-2-725.****Statute of frauds.**

Real property.

Contracts for sale of land, §4-59-101.

**Telephone solicitation sales, §§4-95-101 to 4-95-108.****SALES REPRESENTATIVES,**

§§4-70-301 to 4-70-306.

**Attorneys' fees.**

Noncompliance with provisions relating to payment of commission, §4-70-306.

**Compensation.**

Attorneys' fees and costs.

Noncompliance with provisions relating to payment of commission, §4-70-306.

**Commission.**

Defined, §4-70-301.

**Damages.**

Noncompliance with provisions relating to payment of commission, §4-70-306.

Payment in absence of contract.

Time limitation, §4-70-303.

Damages, attorneys' fees and costs.

Failure to pay within time allowed, §4-70-306.

**Contracts, §4-70-302.**

Payment in absence of contract.

Time limitation, §4-70-303.

Damages, attorney's fees and costs.

Failure to pay commission within time allowed, §4-70-306.

**SALES REPRESENTATIVES —Cont'd****Contracts —Cont'd**

Waiver of provisions of subchapter.

Prohibited, §4-70-305.

**Costs.**

Noncompliance with provisions relating to payment of commission, §4-70-306.

**Damages.**

Noncompliance with provisions relating to payment of commission, §4-70-306.

**Definitions, §4-70-301.****Jurisdiction.**

Jurisdiction over principal, §4-70-304.

**Principal.**

Defined, §4-70-301.

Jurisdiction over, §4-70-304.

**Venue.**

Contractual provisions, §4-70-302.

**Waiver.**

Provisions of subchapter.

Prohibited, §4-70-304.

**SAMPLES.****Drug samples, distribution of, §4-117-102.****SCHOOL CALENDARS.****Disclosures by solicitors for**

**advertisements on, §§4-88-501 to 4-88-503.**

Definitions, §4-88-501.

Penalties, §4-88-503.

Violations, §4-88-502.

**SCHOOLS AND EDUCATION.****Corporations.**

Gifts authorized, §4-25-103.

**Insurance.**

Life insurance naming educational institution, organization, etc., as beneficiary, §4-28-103.

**Nonprofit corporations.**

Articles of incorporation.

Default provisions, §4-33-150.

Inclusion of certain provisions in article, §4-28-207.

**School calendars.**

Disclosures by solicitors for advertisements on, §§4-88-501 to 4-88-503.

Definitions, §4-88-501.

Penalties, §4-88-503.

Violations, §4-88-502.

**SCIENTIFIC ORGANIZATIONS.****Nonprofit corporations (1993).**

Articles of incorporation.

Default provisions, §4-33-150.

**SEALS AND SEALED INSTRUMENTS.****Contracts.**

Sale of goods.

Seals inoperative, §4-2-203.

**Leases.**

Commercial code, §4-2A-203.

**Water authorities, §4-35-210.**

Bond issues, §4-35-302.

**SEARCHES AND SEIZURES.****Weights and measures.**

State plant board.

Special police powers, §4-18-313.

**SECRETARY OF STATE.****Cooperative associations.**

Filing of articles of incorporation with secretary, §4-30-108.

Forms.

Prescription by secretary, §4-30-115.

Performance of duties under act, §4-30-105.

**Corporations.**

Appeals from secretary of state, §4-26-107.

Certificates of secretary of state to be received in evidence, §4-26-106.

Duties, §4-27-130.

Fees.

Business corporations, §§4-26-1202, 4-27-122, 4-27-1705.

Nonprofit organizations, §§4-28-102, 4-28-223.

Filing of documents.

Duties, §4-27-126.

Powers, §§4-26-104, 4-27-130.

Religious, literary, benevolent, etc., corporations.

Fees of secretary of state, §4-28-102.

**Fees.**

Business corporations, §§4-26-1202, 4-27-122, 4-27-1705.

Nonprofit organizations, §§4-28-102, 4-28-223.

**Limited liability companies.**

Amendment of articles of organization.

Filing articles of amendment with secretary, §4-32-203.

Appeal from secretary's refusal to file documents, §4-32-1302.

Certificates of existence.

Applications to secretary for, §4-32-1311.

**SECRETARY OF STATE —Cont'd****Limited liability companies —Cont'd**

Dissolution of company.

Filing articles of dissolution with, §4-32-906.

Fees for filing, service and copying, §4-32-1301.

Filing of documents with, §4-32-205.

Foreign limited liability company registration.

Cancellation, §4-32-1006.

Filing articles of amendments with secretary, §4-32-1005.

Issuance of registration, §4-32-1001.

Transacting business without.

Service of process upon secretary, §4-32-1007.

Powers, §4-32-1305.

Reservation of name by company.

Filing reservation with, §4-32-104.

Restatement of articles of organization.

Filing restated articles with secretary, §4-32-203.

**Limited partnerships.**

Administrative dissolution, §4-47-809.

Reinstatement following, §4-47-810.

Appeal of denial, §4-47-811.

Annual report to secretary of state, §4-47-210.

Foreign limited partnerships.

Action to restrain transacting of business, §4-47-908.

Certificate of authority, §4-47-904.

Notice of revocation, §4-47-906.

Records, delivery to and filing by secretary of state, §4-47-204.

**Nonprofit corporations.**

Articles of incorporation.

Filing with secretary, §4-28-206.

Fees to be paid to secretary of state, §4-28-223.

Powers regarding nonprofit corporations.

Generally, §4-28-216.

Service of process.

Registered agent, §4-28-214.

**Nonprofit corporations (1993).**

Filing duty of secretary, §4-33-125.

Appeal from secretary's refusal to file document, §4-33-126.

Powers.

Annual disclosure of information, §4-33-131.

General powers, §4-33-130.

**Registered agents.**

Fees, §4-20-103.

List of filings, §4-20-105.

**SECRETARY OF STATE —Cont'd****Secured transactions.**

Filing office, financing statements,  
§§4-9-501 to 4-9-527.

**SECURED TRANSACTIONS,**

§§4-9-101 to 4-9-709.

**Accessions.**

Perfection and priority of security  
interest in, §4-9-335.

**Accounting.**

Defined, §4-9-102.

Request for, §4-9-210.

**After-acquired property.**

Security interest in, §4-9-204.

**Agricultural liens.**

Default.

Time of default, §4-9-606.

Defined, §4-9-102.

Perfection and priority.

Filed financing statement providing  
certain incorrect information.

Priority of agricultural lien  
perfected by, §4-9-338.

Filing.

When required to perfect lien,  
§4-9-310.

Interests that take priority over or  
take free of agricultural lien,  
§4-9-317.

Law governing, §4-9-302.

Priorities among agricultural liens  
on same collateral, §4-9-322.

When perfected, §4-9-308.

**Alienability of debtor's rights,**

§4-9-401.

**All the debtor's assets.**

Description insufficient, §4-9-108.

**Applicability of provisions, §§4-9-109,  
4-9-110.****Assigned contract, modification or  
substitution for, §4-9-405.****Assignees.**

Assignee for value, good faith and  
without notice.

Agreement not to assert defenses  
against assignee, §4-9-403.

Claims and defense against, §4-9-404.

Rights, §4-9-404.

**Assignment of powers of secured  
party, §4-9-514.****Assignment to secured party.**

Account debtor notified.

Duties of secured party, §4-9-209.

**Attachment of security interest,  
§4-9-203.**

Effect on delegation of performance  
and assignment of rights,  
§4-9-210.

**SECURED TRANSACTIONS —Cont'd****Attachment of security interest**

—Cont'd

Financial asset.

Security interest arising in purchase  
or delivery of, §4-9-206.

Perfection.

Security interests perfected upon  
attachment, §4-9-309.

**Bank deposits and collections.**

Depository and collecting banks.

Collection of items.

Security interests of collecting  
banks.

Items accompanying documents  
and proceeds, §4-4-210.

Documentary drafts.

Dishonor.

Privilege of presenting bank to  
deal with goods.

Security interest for expenses,  
§4-4-504.

**Banks.**

Defined, §4-9-102.

Jurisdiction, rules governing, §4-9-304.

**Bound as debtor by security  
agreement entered into by  
another, §4-9-203.****Chattel paper.**

Perfection of security interests in,  
§4-9-312.

Purchaser of chattel paper or  
instrument.

Priority, §4-9-330.

**Citation of provisions, §4-9-101.****Collateral.**

Control of collateral.

Rights and duties of secured party  
having, §§4-9-207, 4-9-208.

Default.

Acceptance in full or partial  
satisfaction of obligation,  
§§4-9-620 to 4-9-622.

Disposition after default, §§4-9-610  
to 4-9-617.

Redemption.

Right to redeem collateral,  
§4-9-623.

Transfer of record or legal title,  
§4-9-619.

Description.

Sufficiency, §4-9-108.

Disposition.

Permissible, §4-9-205.

Rights of secured party on, §4-9-315.

List of collateral.

Request regarding, §4-9-210.

**SECURED TRANSACTIONS —Cont'd****Collateral —Cont'd**

Possession of collateral.

Rights and duties of secured party having, §4-9-207.

Preservation, duty of secured party, §4-9-207.

Title immaterial, §4-9-202.

Transferred collateral.

Priority of security interests in, §4-9-325.

Use permissible, §4-9-205.

**Commercially reasonable conduct.**

Secured party's collection and enforcement after default.

Determining if conduct commercially reasonable, §4-9-627.

**Commingled goods, §4-9-336.****Commodity account.**

Description, §4-9-108.

**Commodity contract.**

Control of investment property, §4-9-106.

Priority of security interest in investment property, §4-9-328.

**Commodity intermediary's jurisdiction, rule governing, §4-9-305.****Contract of debtor.**

Secured party not obligated on, §4-9-402.

**Criminal law and procedure.**

Security interest in certain farm products.

Meaning of terms used, §4-56-102.

Unlawful acts relating to, §4-56-102.

**Crops.**

Priority of security interest in, §4-9-334.

**Debtor.**

Defined, §4-9-102.

Location, §4-9-307.

**Decedents' estates.**

Filing statement, name of debtor, §4-9-503.

**Default.**

Acceptance of collateral in full or partial satisfaction of obligation, §4-9-620.

Effect, §4-9-622.

Notification, §4-9-621.

Agreement on standards concerning rights and duties, §4-9-603.

Agricultural lien.

Time of default, §4-9-606.

Collateral.

Acceptance in full or partial satisfaction of obligation, §§4-9-620 to 4-9-622.

**SECURED TRANSACTIONS —Cont'd****Default —Cont'd**

Collateral —Cont'd

Disposition after default, §§4-9-610 to 4-9-617.

Redemption.

Right to redeem collateral, §4-9-623.

Transfer of record or legal title, §4-9-619.

Collection and enforcement by secured party, §4-9-607.

Application of proceeds, §4-9-608.

Deficiency liability, §4-9-608.

Commercially reasonable conduct.

Determination whether conduct commercially reasonable, §4-9-627.

Disposition of collateral after, §4-9-610.

Compulsory disposition, §4-9-620.

Deficiency.

Action in which deficiency is in issue, §4-9-626.

Explanation of calculation of, §4-9-616.

Liability for, §4-9-615.

Notification before, §4-9-611.

Contents and form, §§4-9-613, 4-9-614.

Timeliness, §4-9-612.

Proceeds.

Application, §4-9-615.

Surplus.

Action in which surplus is an issue, §4-9-626.

Explanation of calculation of, §4-9-616.

Right to, §4-9-615.

Transferee of collateral.

Rights, §4-9-617.

Fixtures.

Procedure if security agreement covers, §4-9-604.

Judicial enforcement, §4-9-601.

Limitation on liability of secured party, §4-9-628.

Noncompliance with provisions by secured party.

Remedies, §4-9-625.

Possession.

Rights of secured party to take possession after default, §4-9-609.

Real property.

Procedure if security agreement covers, §4-9-604.

**SECURED TRANSACTIONS —Cont'd****Default —Cont'd**

Rights after default, §4-9-601.  
 Agreement on standards concerning,  
 §4-9-603.

Waiver and variance, §4-9-602.

Secondary obligors.

Liability, §4-9-628.

Rights and duties, §4-9-618.

Unknown debtor or secondary obligor,  
 §4-9-605.

Waiver and variance of rights and  
 duties, §4-9-602.

Waiver of certain rights, §4-9-624.

**Definitions, §§4-9-102, 4-9-103.**

General commercial code definitions,  
 §4-1-201.

**Deposit accounts.**

Bank's rights and duties with respect  
 to, §4-9-341.

Right of recoupment or set-off  
 against deposit account.

Effectiveness, §4-9-340.

Control, §4-9-104.

Banks refusal to enter into or  
 disclose control agreement,  
 §4-9-342.

Defined, §4-9-102.

Perfection and priority of security  
 interest in, §4-9-312.

Law governing, §4-9-304.

Perfection by control, §4-9-314.

Priority of security interests,  
 §4-9-327.

Transfer of funds from deposit  
 account.

Transferee takes funds free of  
 security interest, §4-9-332.

**Description of property.**

Sufficiency, §4-9-108.

**Discharge of account debtor,  
 §4-9-406.****Duties of secured party.**

Account debtor notified of assignment,  
 §4-9-209.

Control or possession of collateral.  
 Secured party having, §§4-9-207,  
 4-9-208.

**Effective date of provisions, §4-9-701.**

Amendment of pre-effective financing  
 statement, §4-9-707.

Effectiveness of action taken before,  
 §4-9-705.

Financing statement, continuing  
 effectiveness, §4-9-706.

Interest perfected before, §4-9-703.

Interest unperfected before, §4-9-704.

**SECURED TRANSACTIONS —Cont'd****Effective date of provisions —Cont'd**

Persons entitled to file financing  
 statement, §4-9-708.

Priority of pre-effective claims,  
 §4-9-709.

**Electronic chattel paper.**

Control, §4-9-105.

Duties of secured party having  
 control of electronic document,  
 §4-9-208.

Perfection by control, §4-9-314.

Defined, §4-9-102.

**Enforceability of security interest,  
 §4-9-203.****Farming operations.**

Financing statement.

Effectiveness of filed record,  
 §4-9-510.

Filing office, §4-9-501.

**Fees.**

Filing office, §4-9-525.

**Filing office, §4-9-501.**

Acceptance and refusal of records,  
 §4-9-520.

Assigning number to filed record,  
 §4-9-519.

Delay by office beyond time limit,  
 §4-9-524.

Destruction of records, §4-9-522.

Fees, §4-9-525.

Indexing financing statements,  
 §4-9-519.

Information to persons filing records,  
 §4-9-523.

Maintenance of records, §§4-9-519,  
 4-9-522.

Refusal to accept record, §§4-9-520,  
 4-9-521.

Report by secretary of state, §4-9-527.

Retrieval of information from records,  
 §4-9-519.

Sale or license of records, §4-9-523.

Uniform form of written financing  
 statement and amendment,  
 §4-9-521.

**Filing-office rules, §4-9-526.**

Defined, §4-9-102.

**Financial asset.**

Priority of certain interests in,  
 §4-9-331.

Purchase or delivery of.

Security interest arising in,  
 §4-9-206.

**Financing statement.**

Amendment, §4-9-512.

Collateral.

Indication of collateral, §4-9-504.

**SECURED TRANSACTIONS —Cont'd****Financing statement —Cont'd**

Compliance with other statutes and treaties, §4-9-505.

Contents, §4-9-502.

Duration of effectiveness, §4-9-515.

Effective date of provisions.

Amendment of pre-effective statement, §4-9-707.

Financing statement, continuing effectiveness, §4-9-706.

Errors and omissions.

Claims concerning inaccurate or wrongfully filed record, §4-9-518.

Effect, §4-9-506.

Indexing errors, §4-9-517.

Events with impact on effectiveness, §4-9-507.

Filing, §§4-9-502, 4-9-505.

Effectiveness, §4-9-516.

Effectiveness of filed record, §4-9-510.

Persons entitled to file, §4-9-509.

Refusal of office to accept, §4-9-516.

Termination statement, §4-9-513.

What constitutes, §4-9-516.

Wrongfully filed record.

Claims concerning, §4-9-518.

Lapsed financing statement.

Effect, §4-9-515.

Mortgages.

Record of mortgage as financing statement, §4-9-502.

Name of debtor and secured party, §4-9-503.

Errors and omissions.

Effect, §4-9-506.

New debtor becoming bound by security agreement.

Effectiveness of financing statement, §4-9-508.

Persons entitled to file financing statement, §4-9-708.

Refusal of office to accept, §4-9-516.

Secured party of record, §4-9-511.

Assignment of powers of, §4-9-514.

Termination statement, §4-9-513.

Time of filing, §4-9-502.

**Fixtures.**

Defaults.

Procedure when fixtures involved, §4-9-604.

Filing office, §4-9-501.

Priority of security interests in, §4-9-334.

**Foreign air carriers, location,** §4-9-307.

**SECURED TRANSACTIONS —Cont'd**  
**Future advances.**

Priority of security interests, §4-9-323.

Security interest in, §4-9-204.

**Goods covered by certificate of title.**

Law governing perfection and priority, §4-9-303.

Priority of security interest in, §4-9-337.

**Health insurance.**

Health-care-insurance receivables.

Defined, §4-9-102.

Restrictions on assignments, §§4-9-406, 4-9-408.

**Holders in due course, rights,** §4-9-331.

**Identification and proof of assignment,** §4-9-406.

**Investment property.**

Control, §4-9-106.

Perfection by control, §4-9-314.

Defined, §4-9-102.

Perfection and priority of security interests in, §4-9-312.

Law governing, §4-9-305.

Perfection by control, §4-9-314.

Priority of security interests, §4-9-328.

**Leases.**

Commercial code lease provisions.

Priority of security interest in goods, §4-2A-307.

Restrictions on security interest in leasehold interest or in lessor's residual interest, §4-9-407.

Security interest.

Lease distinguished from, §4-1-203.

**Lessee in ordinary course of business.**

Defined, rights taken, §4-9-321.

**Letter-of-credit right.**

Assignment.

Restrictions on assignment ineffective, §4-9-409.

Control, §4-9-107.

Defined, §4-9-102.

Perfection and priority of security interests in, §4-9-312.

Law governing, §4-9-306.

Perfection by control, §4-9-314.

Priority of security interests, §4-9-329.

**Licensee in ordinary course of business.**

Defined, rights taken, §4-9-321.

**Location of debtor,** §4-9-307.

**Mortgages.**

Record as financing statement, §4-9-502.

**SECURED TRANSACTIONS —Cont'd****Perfection of security interests.****Attachment.**

Security interests perfected upon attachment, §4-9-309.

**Chattel paper.**

Security interests in, §4-9-312.

**Continuity of perfection, §4-9-308.**

Change in governing law, §4-9-316.

**Control.**

Perfection by, §4-9-314.

**Delivery to secured party.**

Perfection of security interest without filing, §4-9-313.

**Deposit accounts.**

Perfection by control, §4-9-314.

Security interests in, §4-9-312.

**Documents.**

Security interests in, §4-9-312.

**Effect on delegation of performance and assignment of rights, §4-9-210.****Electronic chattel paper.**

Perfection by control, §4-9-314.

**Filing.**

Not required to perfect security interest in property subject to certain statutes, regulations, and treaties, §4-9-311.

Permissive filing, §4-9-312.

When required, §4-9-310.

**Instruments.**

Security interests in, §4-9-312.

**Investment property.**

Perfection by control, §4-9-314.

Security interests in, §4-9-312.

**Law governing, §4-9-301.**

Agricultural liens, §4-9-302.

Deposit accounts, §4-9-304.

Goods covered by certificate of title, §4-9-303.

Investment property, §4-9-305.

Letter-of-credit rights, §4-9-306.

**Letter-of-credit rights.**

Law governing, §4-9-306.

Perfection by control, §4-9-314.

Security interests in, §4-9-312.

**Money.**

Security interests in, §4-9-312.

**Possession by secured party.**

Perfection of security interest without filing, §4-9-313.

**Treaties.**

Security interest in property subject to certain treaties, §4-9-311.

When perfected, §4-9-308.

**Place of business.**

Location of debtor, §4-9-307.

**SECURED TRANSACTIONS —Cont'd****Preservation of collateral.**

Duty of secured party, §4-9-207.

**Priority of security interests.**

Accessions, §4-9-335.

**Agricultural liens.**

Agricultural liens on same collateral, §4-9-322.

Filed financing statement providing certain incorrect information.

Agricultural lien perfected by, §4-9-338.

Interests that take priority over or take free of, §4-9-317.

Law governing, §4-9-302.

Buyer of goods, §4-9-320.

**Certificate of title.**

Security interest in goods covered by, §4-9-337.

**Chattel paper or instrument.**

Priority of purchaser, §4-9-330.

Claims prior to effective date, §4-9-709.

Commingled goods, §4-9-336.

Conflicting security interests, §4-9-322.

**Consignee.**

Rights and title with respect to creditors and purchasers, §4-9-319.

Crops, §4-9-334.

Deposit account, §4-9-327.

Transfer of funds from, §4-9-332.

Filed financing statement providing certain incorrect information.

Security interest perfected by, §4-9-338.

**Financial asset.**

Priority of certain interests in, §4-9-331.

Fixtures, §4-9-334.

Future advances, §4-9-323.

Investment property, §4-9-328.

Law governing, §4-9-301.

Agricultural liens, §4-9-302.

Deposit accounts, §4-9-304.

Goods covered by certificate of title, §4-9-303.

Investment property, §4-9-305.

Letter-of-credit rights, §4-9-306.

Lessee of goods in ordinary course of business, §4-9-321.

Letter-of-credit right, §4-9-329.

Law governing, §4-9-306.

Licensee of general intangible, §4-9-321.

Liens arising by operation of law, §4-9-333.

**SECURED TRANSACTIONS —Cont'd****Priority of security interests —Cont'd**

New debtor.

Security interests created by,  
§4-9-326.

Purchase-money security interests,  
§4-9-324.

Purchasers of instruments, documents,  
and securities under other  
provisions.

Priority of rights of, §4-9-331.

Sale of right to payment, §4-9-318.

Subordination.

Priority subject to, §4-9-339.

Transfer of money.

Transferee takes money free of  
security interest, §4-9-332.

Transferred collateral, §4-9-325.

Unperfected security interest.

Interests that take priority over or  
take free of, §4-9-317.

**Proceeds.**

Rights of secured party in, §4-9-315.

**Public utilities.**

Transmitting utilities.

Filing requirements, §4-19-104.

**Purchase-money security interests,  
§4-9-103.**

Priority, §4-9-324.

**Real property.**

Default, security agreement covering,  
procedure, §4-9-604.

**Reasonable care.**

Duty of secured party to use, §4-9-207.

**Recoupment against deposit  
account.**

Banks rights and duties, §4-9-340.

**Registered organization.**

Filing statement, name of debtor,  
§4-9-503.

Location, §4-9-307.

**Restrictions on certain assignments,  
§4-9-406.**

Certain restrictions ineffective,  
§§4-9-408, 4-9-409.

**Savings clause, §4-9-702.****Scope of provisions, §§4-9-109,  
4-9-110.****Security agreement.**

Effectiveness, §4-9-201.

**Security or security entitlement.**

Attachment of security interest.

Purchase or delivery of financial  
asset, §4-9-206.

Control of investment property,  
§4-9-106.

Description insufficient, §4-9-108.

**SECURED TRANSACTIONS —Cont'd****Security or security entitlement  
—Cont'd**

Law governing perfection or priority,  
§4-9-305.

Priority of security interest in  
investment property, §4-9-328.

**Set-off against deposit account.**

Banks rights and duties, §4-9-340.

**Statement of account.**

Request regarding, §4-9-210.

**Subordination.**

Priority subject to, §4-9-339.

**Torts of debtor.**

Secured party not obligated on,  
§4-9-402.

**Trusts and trustees.**

Filing statement, name of debtor,  
§4-9-503.

**SECURITIES.****Commercial code.**

Investment securities, §§4-8-101 to  
4-8-603.

**Franchises.**

Restrictions imposed by franchisor.  
Unlawful practices, §4-72-206.

**Investment securities.**

Commercial code, §§4-8-101 to 4-8-603.

**SECURITY CODE.****Personal information protection act,  
§§4-110-101 to 4-110-108.****SENIOR CITIZENS.****Deceptive trade practices, enhanced  
penalties for targeting elderly  
persons.**

Cause of action, §4-88-204.

Civil penalties, §4-88-202.

Determination, §4-88-203.

Definitions, §4-88-201.

Disposition of funds.

Obtained from civil penalties,  
§4-88-202.

Education incentive, §4-88-205.

Elder and disabled victims' fund.

Created, §4-88-207.

Referrals for abuse, neglect and  
exploitation, §4-88-206.

**SERVICE CONTRACTS, §§4-114-101  
to 4-114-112.****Administration of contracts.**

Appointment of administrator,  
§4-114-104.

Contract to identify administrator,  
§4-114-106.

Recordkeeping, §4-114-108.

**Cancellation of reimbursement  
insurance policies, §4-114-109.**

**SERVICE CONTRACTS —Cont'd****Contents of contract**, §4-114-106.**Covered service not provided within certain time.**

Direct application to reimbursement insurance company, §4-114-105.

**Definitions**, §4-114-103.**Disclosures.**

Reimbursement insurance policies, §4-114-105.

Service contracts generally, §4-114-106.

**Enforcement of provisions**, §4-114-111.**Exclusions from provisions**, §4-114-102.**Fees.**

Registration of providers, §4-114-104.

**Insurance requirements**, §4-114-104.**Motor vehicles.**

Citation of subchapter, §4-90-501.

Definitions, §4-90-502.

Affiliate, §4-90-503.

Disclosures required, §4-90-505.

Enforcement of provisions, §4-90-509.

Exclusive governance of provisions, §4-90-503.

Form of contracts, §4-90-511.

Incidental benefits, §4-90-507.

Investigations, §4-90-509.

Mandatory insurance, §4-90-504.

Refunds, §4-90-506.

Rulemaking authority, §4-90-508.

Termination, §4-90-506.

Unfair trade practices, §4-90-510.

**Prerequisites**, §4-114-104.**Prior approval of work to be done.**

Contract to state procedures, §4-114-106.

**Prohibited acts**, §4-114-107.**Purpose of provisions**, §4-114-102.**Recordkeeping by provider**, §4-114-108.**Registration of providers**, §4-114-104.**Reimbursement insurance policies.**

Cancellation, §4-114-109.

Disclosures, §4-114-105.

Obligations of insurers, §4-114-110.

**Reserve requirements for providers**, §4-114-104.**Rules promulgation**, §4-114-112.**Scope of provisions**, §4-114-102.**Surety bond of provider**, §4-114-104.**Title of provisions**, §4-114-101.**SERVICE OF NOTICE, PROCESS AND OTHER PAPERS.****Advertising.**

Registered agent for service.

Registration, §4-25-101.

**SERVICE OF NOTICE, PROCESS AND OTHER PAPERS —Cont'd****Charitable contributions, solicitation by nonresident organization**, §4-28-413.**Constructive service.**

Corporations.

Dissolution.

Involuntary dissolution, §4-26-1107.

**Corporations.**

Foreign corporations.

Registered agents, §4-27-1510.

Required, §4-27-1510.

Registered agents.

Foreign corporations.

Requirement of registered agent, §4-27-1510.

**Foreign investor companies**, §4-31-204.**Health-related discount cards not insurance.**

Sellers to designate and register agent for service of process, §4-106-203.

**Limited liability companies.**

Fee, §4-32-1301.

Foreign limited liability companies transacting business without registration, §4-32-1007.

**Limited partnerships.**

Administrative dissolution.

Appeal of denial of reinstatement, §4-47-811.

Change of office and agent for service, §4-47-115.

Conversion and merger.

Foreign organization that is converted.

Consent to jurisdiction, §4-47-1105.

Foreign organization that is survivor of merger.

Consent to jurisdiction, §4-47-1109.

Designation of office and agent for service, §4-47-114.

**Model registered agents act**, §§4-20-101 to 4-20-118.**Monopolies and restraint of trade.**

Discrimination.

Price of manufactured products, coal oil or dressed beef.

Actions for recovery of forfeitures, §4-75-501.

**Nonprofit corporations.**

Procedure, §4-28-214.

Secretary of state as registered agent, §4-28-214.

## **SERVICE OF NOTICE, PROCESS AND OTHER PAPERS —Cont'd**

### **Nonprofit corporations (1993).**

Fees, §4-33-122.

On foreign corporation, §4-33-1510.

**Registered agents**, §§4-20-101 to 4-20-118.

**Solicitation of charitable contribution by nonresident organization**, §4-28-413.

**Telephonic sellers**, §4-99-109.

**Trademark actions**, §4-71-215.

**Unincorporated nonprofit associations.**

Agent for, §4-28-611.

Service on agent, §4-28-612.

## **SETOFFS AND RECOUPMENT.**

### **Limited partnerships.**

Distributions.

Offsets for amounts owed to partnership, §4-47-507.

### **Negotiable instruments.**

Defenses and claims in recoupment, §4-3-305.

### **Secured transactions.**

Banks rights and duties, §4-9-340.

## **SHERIFFS.**

### **Going out of business sales.**

Enforcement of chapter, §4-74-104.

## **SIGNATURES.**

### **Corporations.**

Stock and stockholders.

Certificates representing shares.

Signed certificates, §§4-26-608, 4-27-625.

### **Investment securities.**

Authenticating trustee's, registrar's or transfer agent's signature.

Effect, §4-8-208.

Effect of guaranteeing, §4-8-306.

Unauthorized signatures.

Effect, §4-8-205.

**Letters of credit**, §4-5-104.

### **Limited liability companies.**

Documents required to be filed with secretary of state, §4-32-204.

### **Limited partnerships.**

Records filed with secretary, §§4-47-204, 4-47-205.

**Statute of frauds**, §4-59-101.

### **Water authorities.**

Bond issues, §4-35-302.

## **SIMPLIFICATION OF FIDUCIARY SECURITY TRANSFERS,**

§4-8-402.

## **SLAMMING IN**

### **TELECOMMUNICATIONS**

**INDUSTRY**, §§4-88-401 to 4-88-403.

**Definitions**, §4-88-401.

**Penalties, remedies and enforcement**, §4-88-403.

**Prohibited**, §4-88-402.

**Unfair or deceptive act or practice**, §4-88-403.

## **SMALL BUSINESS ENTITY TAX PASS THROUGH.**

**Limited liability companies generally**, §§4-32-101 to 4-32-1316.

## **SOCIAL SECURITY.**

### **Numbers.**

Consumer protection against computer spyware act, §§4-111-101 to 4-111-105.

Personally identifiable information defined, §4-111-102.

Misappropriation, prohibited acts, §4-86-107.

Personal information protection act, §§4-110-101 to 4-110-108.

## **SOCIAL SECURITY NUMBERS.**

**Consumer protection against computer spyware act**, §§4-111-101 to 4-111-105.

Personally identifiable information defined, §4-111-102.

**Misappropriation, prohibited acts**, §4-86-107.

**Personal information protection act**, §§4-110-101 to 4-110-108.

## **SOLICITATION.**

**Charitable solicitations**, §§4-28-401 to 4-28-416.

### **Credit cards.**

Solicitation on college campus, §§4-104-201 to 4-104-204.

### **Financial transaction cards.**

Solicitation of merchant to remit record of sale not made by the merchant, §4-59-503.

**Home solicitation sales**, §§4-89-101 to 4-89-110.

**Mail and telephone solicitation sales**, §§4-95-101 to 4-95-108.

## **SOYBEANS.**

### **Security interest in farm products.**

Failure to disclose person with, §4-56-102.

**SPAM E-MAIL**, §§4-88-601 to 4-88-607.

**Authority of providers**, §4-88-604.

### **Blocking receipt.**

Authority of providers, §4-88-604.

**SPAM E-MAIL —Cont'd****Civil action.**

Damages, costs and attorneys' fees, defense, §4-88-606.

**Criminal penalty, §4-88-605.****Definitions, §4-88-602.****Enforcement of provisions, §4-88-607.****Notice by recipient not to send future communications, §4-88-603.****Preexisting business or personal relationship with recipient.**

Commercial mail not unsolicited, §4-88-603.

**Requirements for sending, §4-88-603.****Short title, §4-88-601.****SPAS.****Health spas.**

Consumer protection, §§4-94-101 to 4-94-109.

**SPECIFIC PERFORMANCE.****Franchises.**

Petroleum products franchises.

Dealer-supplier or distributor franchises.

Cancellation, termination or refusal to renew, §4-72-503.

Supplier-distributor franchises.

Cancellation, termination or refusal to renew, §4-72-403.

**Leases.**

Commercial code.

Right of lessee upon default, §§4-2A-508, 4-2A-521.

**Sale of goods.**

Commercial code.

Buyer's right to specific performance, §4-2-716.

**SPYWARE.****Consumer protection against computer spyware act,**

§§4-111-101 to 4-111-105.

**STATE DEPARTMENTS AND AGENCIES.****Electronic records.**

Personal information protection act, §§4-110-101 to 4-110-108.

**Nonprofit corporations.**

Rules and regulations by state agencies applicable, §4-28-217.

**Personal information protection act.**

Electronic records, §§4-110-101 to 4-110-108.

**STATE INSTITUTIONS.****Milk and milk products.**

Unfair trade practices.

Exceptions, §4-75-803.

**STATUTE OF FRAUDS.****Bankruptcy and insolvency.**

Promises to pay debt discharged in bankruptcy.

Writing required, §4-59-101.

**Commercial code.**

Leases, §4-2A-201.

**Confidences.**

Declarations, creations or assignments.

Writing required, §4-59-103.

**Contracts.**

Promise to pay debt contracted during infancy.

Writing required, §4-59-101.

**Debts.**

Promise to answer for debt of another.

Writing required, §4-59-101.

Promise to pay debt contracted during infancy.

Writing required, §4-59-101.

**Definitions, §4-59-101.****Estates.**

Assignment.

Compliance of statute required, §4-59-102.

Violation of statute.

Effect, §4-59-102.

**Executors and administrators.**

Contracts charging representative personally, §4-59-101.

**Investment securities, §4-8-113.****Landlord and tenant.**

Leases, estates, etc., §4-59-102.

**Leases.**

Assignment.

Compliance of statute required, §4-59-102.

Violation of statute.

Effect, §4-59-102.

Writing required, §4-59-101.

**Marriage.**

Charges upon agreements made in consideration of marriage, §4-59-101.

**Minors.**

Promise to pay debt contracted during infancy.

Writing required, §4-59-101.

**Real property.**

Leases, estates, etc., to be in writing, §4-59-102.

Sale of land, §4-59-101.

**Sales.**

Real property.

Contracts for sale of land, §4-59-101.

**Signatures, §4-59-101.**

**STATUTE OF FRAUDS —Cont'd**  
**Time.**

Performance within one year,  
§4-59-101.

**Trusts and trustees.**

Declaration, creations or assignments.  
Writing required, §4-59-103.

**STATUTE OF LIMITATIONS.****Checks, §4-4-404.****Commercial code.**

Bank deposits and collections,  
§4-4-111.

Checks, §4-4-404.

Negotiable instruments.

Schedule of periods in which  
commence actions, §4-3-118.

Sales.

Contracts for sales and warranty,  
§4-2-725.

**Consumer protection, §4-88-115.**

**Contracts.**

Sale of goods, §4-2-725.

**Franchises.**

Petroleum products franchises.

Dealer-supplier or distributor  
franchises.

Cancellation, termination or  
refusal to renew, §4-72-503.

Supplier-distributor franchises.

Cancellation, termination or  
refusal to renew, §4-72-403.

**Fraudulent conveyances, §4-59-209.**

**Health-related discount cards not  
insurance.**

Action for violation, §4-106-202.

**Leases.**

Commercial code.

Actions for default, §4-2A-506.

**Lemon law.**

Actions, §4-90-416.

**Letters of credit, §4-5-115.**

**Limited liability companies.**

Appeal from secretary of state's  
refusal to file documents,  
§4-32-1302.

Known claims against dissolved  
companies, §4-32-907.

Unknown claims against dissolved  
companies, §4-32-908.

**Limited partnerships.**

Dissolution, claims not known at time  
of, §4-47-807.

Improper distributions, §4-47-509.

**Monopolies and restraint of trade.**

Actions by attorney general, §4-75-320.

Unfair practices, §4-75-217.

**Negotiable instruments, §4-3-118.**

**STATUTE OF LIMITATIONS —Cont'd**

**Odometer tampering, §4-90-207.**

**Pay per call.**

Consumer actions, §4-98-105.

**Sales.**

Contracts for sales and warranty,  
§4-2-725.

**Trade secrets.**

Misappropriation, §4-75-603.

**Warehouse receipts.**

Contractual limitation of warehouse's  
liability, §4-7-204.

**STATUTE OF REPOSE.****Banking.**

Objections to debiting of accounts,  
§4-4A-505.

**STATUTES.**

**Frauds, §§4-59-101 to 4-59-103.**

**STOCK AND STOCKHOLDERS.****Commercial code.**

Investment securities, §§4-8-101 to  
4-8-603.

**Dental corporations, §§4-29-407,  
4-29-411.**

**Investment securities.**

Commercial code, §§4-8-101 to 4-8-603.

**Medical corporations.**

License requirements, §4-29-307.

Shares of deceased or disqualified  
shareholders, §4-29-312.

**STOLEN PROPERTY.**

**Negotiable instruments, §4-3-309.**

Cashier's check, teller's check or  
certified check, §4-3-312.

**STORAGE.****Agricultural commodities.**

Warehouse receipts.

Storage under government bond,  
§4-7-201.

**Alcoholic beverages.**

Warehouse receipts.

Storage under government bond,  
§4-7-201.

**SUBORDINATION.****Leases, UCC.**

Subordination of priority, §4-2A-311.

**Secured transactions.**

Priority subject to, §4-9-339.

**SWEEPSTAKES.**

**Mail and telephone solicitation  
sales, §§4-95-101 to 4-95-108.**

**Prize promotion generally,  
§§4-102-101 to 4-102-109.**

## T

**TAMPERING.**

**Odometers**, §4-90-204.

**TAXATION.**

**Foreign investor companies**,

§4-31-205.

**Limited liability company.**

Income tax status, §4-32-1313.

**Refunds.**

Anticipation loans, §§4-116-101 to 4-116-108.

**Water authorities.**

Bond issues.

Tax exemption of bonds, §4-35-304.

Projects.

Tax exemption, §4-35-108.

**TAX EXEMPTIONS.**

**Water authorities**, §4-35-108.

**TAX PASS THROUGHs.**

**Small business entity tax pass throughs.**

Limited liability companies generally, §§4-32-101 to 4-32-1316.

**TELECOMMUNICATIONS.****Advertising.**

Pay per call, §4-98-104.

**Caller identification service.**

Deceptive trade practices.

Defined, §4-88-102.

Fictitious or misleading names or telephone numbers.

Displaying resident's service, §4-88-107.

Telephone sellers.

Blocking by, §§4-99-301 to 4-99-303.

Defined, §4-99-103.

Fictitious or misleading name or telephone number.

Displaying, §§4-99-103, 4-99-201.

**Consumer protection.**

Pay per call, §§4-98-101 to 4-98-105.

**Definitions.**

Pay per call, §4-98-102.

**No call lists.**

Consumer telephone privacy act, §§4-99-401 to 4-99-408.

**Pay per call.**

Advertisement requirements, §4-98-104.

Citation of chapter, §4-98-101.

Consumer remedies, §4-98-105.

Definitions, §4-98-102.

Information and disclosure message, §4-98-103.

**TELECOMMUNICATIONS —Cont'd**

**Slamming in telecommunications industry**, §§4-88-401 to 4-88-403.

Definitions, §4-88-401.

Penalties, remedies and enforcement, §4-88-403.

Prohibited, §4-88-402.

Unfair or deceptive act or practice, §4-88-403.

**TELEMARKETING.****Attorney general.**

Agent for service, §4-99-109.

Enforcement of chapter, §4-99-111.

**Bonds, surety**, §4-99-107.

**Caller identification.**

Blocking by telephonic sellers, §§4-99-301 to 4-99-303.

Definitions, §4-99-301.

Penalties and remedies, §4-99-303.

Prohibition, §4-99-302.

Unfair or deceptive or practice, §4-99-303.

Defined, §4-99-103.

Fictitious or misleading name or telephone number.

Displaying, §§4-99-103, 4-99-201.

**Check, draft or negotiable instrument.**

Submitting for payment drawn on consumer's account.

Express consent of consumer required, §4-99-203.

**Collection practices**, §4-99-202.

**Construction and interpretation**, §4-99-102.

**Deceptive trade practices**, §4-99-111.

**Definitions**, §4-99-103.

**Findings of legislature**, §4-99-101.

**Gifts, prizes and awards.**

Prospective purchasers.

Information to be provided, §4-99-108.

**Identification of caller**, §4-99-201.

**Intent of legislature**, §4-99-101.

**Legislative declaration**, §4-99-101.

**Mail and telephone solicitation sales**, §§4-95-101 to 4-95-108.

Citation of act, §4-95-101.

Civil penalties, §4-95-104.

Criminal penalties, §4-95-103.

Definitions, §4-95-102.

Exemptions from act, §4-95-107.

Identification of caller, §4-99-201.

Inapplicability of act, §4-95-107.

Offers of gifts and prizes.

"Gift or prize" defined, §4-95-102.

Unlawful practices, §4-95-105.

**TELEMARKETING —Cont'd****Mail and telephone solicitation sales —Cont'd**

Purchase agreements.

Generally, §4-95-106.

Waiver or attempt to waive provisions.

Voidness and unenforceability of act, §4-95-108.

Title of act, §4-95-101.

Unlawful practices.

Civil penalties, §4-95-104.

Criminal penalties, §4-95-103.

Offers of gifts or prizes, §4-95-105.

"Gift or prize" defined, §4-95-102.

**No call lists, §§4-99-401 to 4-99-408.**

Applicability of provision, §4-99-406.

Arkansas consumer telephone privacy act.

Short title, §4-99-401.

Deceptive trade practice.

Violations, §4-99-407.

Definition, §4-99-403.

Enforcement, §4-99-407.

Findings, §4-99-402.

Intent, §4-99-402.

Persons exempt, §4-99-406.

Short title.

Arkansas consumer telephone privacy act, §4-99-401.

Statewide database.

Attorney general to establish, §4-99-404.

Calling number included in database, prohibition, §4-99-405.

Calling number without first accessing database, §4-99-405.

Listing charge, §§4-99-404, 4-99-408.

**Prize promotion, §4-102-108.****Promotional offering, §4-99-107.****Prospective purchasers.**

Gifts, prizes, awards.

Information to be provided, §4-99-108.

Soliciting on behalf of unregistered seller, §4-99-110.

**Registration, §4-99-104.**

Exemption, §4-99-106.

Information required to be filed, §4-99-105.

Exemption information, §4-99-106.

Soliciting prospective purchaser on behalf of unregistered seller, §4-99-110.

**Remedies for violations, §4-99-111.****Service of process, §4-99-109.****TELEMARKETING —Cont'd****Solicitation of charitable contributions by professional telemarketers.**

Professional telemarketer defined common, §4-28-401.

Registration required, §4-28-411.

**Unfair competition and deceptive trade practices, §4-99-111.****TELEPHONE CHECKS.****Telemarketers submitting check for payment.**

Express consent of consumer required, §4-99-203.

**TELLER'S CHECKS.**

Defined, §4-3-104.

Effect on obligation for which taken, §4-3-310.

Negotiable instruments generally, §§4-3-101 to 4-3-605.

Refusal to pay, §4-3-411.

**THEFT.****Documents of title.**

Stolen documents, §4-7-601.

**THIRD PARTIES.****Contracts.**

Sale of goods.

Warranties.

Third-party beneficiaries, §4-2-318.

Who can sue third parties for injury to goods, §4-2-722.

**Credit report security freezes.**

Third party request for access while in place, §4-112-105.

**Negotiable instruments.**

Notice of right to defend action, §4-3-119.

**Nonprofit corporations (1993).**

Member's liability, §4-33-611.

**THREATS.****Monopolies and restraint of trade.**

Automobile dealer's anti-coercion act.

Exclusive financing agreements, §§4-75-409, 4-75-410.

**TICKET DONATIONS.****Solicitation of charitable contributions by paid solicitor.**

Representations and records, §4-28-407.

**TICKETS.**

Internet sales, restrictions, §4-70-103.

**TIME.****Limited liability partnerships.**

Annual report.

Filing, §4-46-1003.

**TIME —Cont'd****Statute of frauds.**

Performance within one year,  
§4-59-101.

**TIME SHARES.**

**Mail and telephone solicitation sales,** §§4-95-101 to 4-95-108.

**Telephone solicitation sales,** §§4-95-101 to 4-95-108.

**TITLE.****Contracts.**

Sale of goods.

Warranty of title, §4-2-312.

**Documents of title,** §§4-7-101 to 4-7-704.

**Limited liability company real property,** §4-32-701.

**TORTS.****Comparative negligence.**

Bank deposits and collections.

Unauthorized signature or alteration, customer's duty to report, §4-4-406.

**Contributory negligence.**

Bank deposits and collections.

Unauthorized signature or alteration, customer's duty to report, §4-4-406.

**Cooperative associations.**

Liability of cooperative for torts,  
§4-30-118.

**Limited liability companies.**

Liability of members, managers, agents, etc., §4-32-304.

**Products liability,** §4-86-102.

**Secured transactions.**

Secured party not obligated in tort,  
§4-9-402.

**TRADEMARKS.****Protection,** §§4-71-201 to 4-71-218.

Application for registration,  
§§4-71-203, 4-71-204.

Assignments, §4-71-207.

Cancellation, §4-71-209.

Certificate of registration, §§4-71-205, 4-71-206.

Change of name, §4-71-207.

Classification, §4-71-210.

Common law rights, §4-71-216.

Corporate, fictitious, or assumed names.

Notice to registrant regarding violation of trademark,  
§4-27-406.

Definitions, §4-71-201.

Fees, §4-71-217.

**TRADEMARKS —Cont'd****Protection —Cont'd**

Fraudulent registration, §4-71-211.

Infringement, §4-71-212.

Injury to business reputation,  
§4-71-213.

Record of registered marks, §4-71-208.

Registrability, §4-71-202.

Remedies for violations, §4-71-214.

Repeal of prior acts, §4-71-218.

Venue of actions, §4-71-215.

**Registration.**

Protection, §§4-71-201 to 4-71-218.

**TRADE SECRETS.****Attorneys' fees.**

Award to prevailing party in action,  
§4-75-607.

**Confidentiality of information.**

Actions under provisions.

Preservation of secrecy, §4-75-605.

**Conflict of laws.**

Effect of act on other laws, §4-75-602.

**Consumer protection.**

Evidence held in camera, §4-88-111.

**Damages.**

Misappropriation, §4-75-606.

**Injunctions.**

Misappropriation, §4-75-604.

**Limitation of actions.**

Misappropriation, §4-75-603.

**Misappropriation.**

Attorneys' fees.

Award to prevailing party in actions for, §4-75-607.

Damages, §4-75-606.

Defined, §4-75-601.

Injunctions, §4-75-604.

Limitation of actions, §4-75-603.

**Preservation of secrecy.**

Actions under provisions, §4-75-605.

**TRANSSHIPMENT OF GOODS.****Uniform commercial code.**

No arrival, no sale, §4-2-324.

**TRAVELER'S CHECKS.**

Defined, §4-3-104.

**TREATIES.****Documents of title.**

Relation of article to treaties, §4-7-103.

**TREES AND TIMBER.****Contracts.**

Sales chapter of UCC.

Applicability, §4-2-107.

**Secured transactions.**

Law governing perfection and priority.

Timber to be cut, §4-9-301.

**TREES AND TIMBER —Cont'd****Weights and measures.**

Cord.

Defined, §4-18-333.

**TRUSTS AND TRUSTEES.****Business trusts.**

Foreign business trusts.

Filing requirements, §§4-31-401 to 4-31-406.

**Foreign business trusts.**

Filing requirements, §§4-31-401 to 4-31-406.

**Foreign investor companies.**

Activities as trustee or agent of trust, §4-31-202.

**Investment securities.**

Authenticating trustee.

Effect of signature, §4-8-208.

**Limited liability companies.**

Companies engaged in practice of law acting as trustee, §4-32-307.

Profits or benefits derived by member or manager held as, §4-32-402.

**Secured transactions.**

Filing statement, name of debtor, §4-9-503.

**Statute of frauds.**Declaration, creation or assignment.  
Writing required, §4-59-103.**U****UCC.****Bank deposits and collections,**

§§4-4-101 to 4-4-504.

**Documents of title, §§4-7-101 to**

4-7-704.

**Funds transfers, §§4-4A-101 to**

4-4A-507.

**General provisions, §§4-4-101 to**

4-10-103.

**Investment securities, §§4-8-101 to**

4-8-603.

**Leases, §§4-2A-101 to 4-2A-532.****Letters of credit, §§4-5-101 to 4-5-120.****Negotiable instruments, §§4-3-101 to**

4-3-605.

**Sale of goods, §§4-2-101 to 4-2-725.****ULTRA VIRES.****Corporations.**

Defenses, §§4-26-205, 4-27-304.

**Nonprofit corporations (1993),**

§4-33-304.

**UNCLAIMED PROPERTY.****Bills of lading.**

Lost, stolen or destroyed bills, §4-7-601.

**UNCLAIMED PROPERTY —Cont'd**  
**Documents of title.**

Lost, stolen or destroyed documents, §4-7-601.

**Warehouse receipts.**

Lost, stolen or destroyed receipts, §4-7-601.

**UNCONSCIONABILITY.****Sale of goods, UCC, §4-2-302.****UNFAIR AND DECEPTIVE TRADE PRACTICES.****Burden of proof.**

Exemption or exception from definition in chapter, §4-99-112.

**Caller identification blocking by telephonic sellers, §§4-99-301 to 4-99-303.****Collection practices.**

Telephone solicitations, §4-99-202.

**Credit card processing services, §4-115-102.****Credit card solicitation on college campus, §§4-104-201 to 4-104-204.****Discount cards.**

Health-related discount cards, §§4-106-201 to 4-106-205.

**Fair disclosure of state funded payments for pharmacists' services act, §§4-88-801 to 4-88-804.****Fair gift card act, §§4-88-701 to 4-88-706.****Health-related discount cards, §§4-106-201 to 4-106-205.****Mail and telephone solicitation sales, §§4-95-101 to 4-95-108.****Milk and milk products.**

General provisions, §§4-75-801 to 4-75-809.

**Motor vehicles.**

Service contracts, §4-90-510.

**Notario or notario publico.**

Advertising services using terms. Restrictions, §§4-109-101 to 4-109-105.

**Pay per call, §4-98-105.****Pharmacists and pharmacy.**

Fair disclosure of state funded payments for pharmacists' services act, §§4-88-801 to 4-88-804.

**Prizes.**

Telephone offer of prize to consumer. Dispatching courier to consumer's home to collect fees or costs prohibited, §4-99-202.

**UNFAIR AND DECEPTIVE TRADE PRACTICES —Cont'd****School calendars.**

Disclosures by solicitors for advertisements on, §§4-88-501 to 4-88-503.

**Slamming in telecommunications industry, §§4-88-401 to 4-88-403.****Telephone sellers, §4-99-111.**

Caller identification blocking by telephonic sellers, §§4-99-301 to 4-99-303.

Collection practices, §4-99-202.

**UNIFORM LAWS.****Bank deposits and collections, §§4-4-101 to 4-4-504.****Commercial code.**

Bank deposits and collections, §§4-4-101 to 4-4-504.

Documents of title, §§4-7-101 to 4-7-704.

Funds transfers, §§4-4A-101 to 4-4A-507.

General provisions, §§4-4-101 to 4-10-103.

Investment securities, §§4-8-101 to 4-8-603.

Leases, §§4-2A-101 to 4-2A-532.

Letters of credit, §§4-5-101 to 4-5-120.

Negotiable instruments, §§4-3-101 to 4-3-605.

Sale of goods, §§4-2-101 to 4-2-725.

**Contracts.**

Sale of goods, §§4-2-101 to 4-2-725.

**Electronic funds transfers,**

§§4-4A-101 to 4-4A-507.

**Investment securities, §§4-8-101 to 4-8-603.****Leases.**

Commercial code leases, §§4-2A-101 to 4-2A-532.

**Letters of credit, §§4-5-101 to 4-5-120.****Limited partnership act, §§4-47-101 to 4-47-1302.****Negotiable instruments, §§4-3-101 to 4-3-605.****Nonprofit associations.**

Unincorporated associations, revised act, §§4-28-601 to 4-28-636.

**Partnerships.**

Limited partnership act of 2001, §§4-47-101 to 4-47-1302.

Uniform partnership act of 2006, §§4-46-101 to 4-46-1207.

**Sale of goods, §§4-2-101 to 4-2-725.****Securities.**

Investment securities.

Commercial code provisions, §§4-8-101 to 4-8-603.

**UNIFORM LAWS —Cont'd**  
**Unincorporated nonprofit**

**associations, revised act,**  
§§4-28-601 to 4-28-636.

**UNINCORPORATED NONPROFIT ASSOCIATIONS, §§4-28-601 to 4-28-636.****Access to information.**

Members, managers and former members or managers, §4-28-625.

**Actions involving association, §4-28-609.**

Change of member or managers, effect, §4-28-613.

Reimbursement or payment of expenses, fees and costs, §4-28-627.

Venue, §4-28-614.

**Agent for service of process, §4-28-611.****Approval of membership for certain activities, §4-28-616.****Conflict of laws, §§4-28-603, 4-28-604.****Construction of provisions.**

Effect of other laws, §4-28-603.

Relation to electronic signatures in global and national commerce act, §4-28-633.

Uniform application and construction, §4-28-632.

**Definitions, §4-28-602.****Dissolution of association, §4-28-628.**

Winding up and termination, §4-28-629.

**Effective date of provisions, §4-28-636.****Governing law, §4-28-604.****Grandfather clause, §4-28-634.****Insurance, purchase on behalf of member or manager, §4-28-627.****Judgment or order against association, §4-28-610.****Legal entity, status as, §4-28-605.****Liability in contract and tort, §4-28-608.****Managers.**

Access to information, §4-28-625.

Compensation and expenses, §§4-28-626, 4-28-627.

Conflicts of interest, §4-28-623.

Distributions to, prohibition, §4-28-626.

Duties, §4-28-623.

Equal rights in management and conduct of activities, §4-28-622.

Fiduciary duties, §4-28-623.

Indemnification, §4-28-627.

## **UNINCORPORATED NONPROFIT ASSOCIATIONS —Cont'd**

### **Managers —Cont'd**

- Liability insurance, §4-28-627.
- Limitation of liability, §4-28-623.
- Meetings, notice and quorum, §4-28-624.
- Prudent person standards, §4-28-623.
- Selection of managers, §4-28-622.

### **Members.**

- Access to information, §4-28-625.
  - Action not abated by change of members, §4-28-613.
  - Admission to membership, §4-28-619.
  - Agent status not gained by virtue of membership, §4-28-615.
  - Approval of membership for certain activities, §4-28-616.
  - Assertion and defense of claims, §4-28-609.
  - Compensation and expenses, §§4-28-626, 4-28-627.
  - Dismissal, suspension or expulsion, §4-28-619.
  - Distributions to, prohibition, §4-28-626.
  - Duties, §4-28-618.
  - Indemnification, §4-28-627.
  - Interests not transferable, §4-28-621.
  - Liability insurance, §4-28-627.
  - Meetings, §4-28-617.
  - Personal liability, §4-28-608.
    - Resignation of member, effect, §4-28-620.
  - Resignation, §4-28-620.
- Mergers, §4-28-630.**
- Perpetual duration, §4-28-605.**
- Personal liability, §4-28-608.**
- Powers generally, §4-28-605.**
- Profit-making activities, §4-28-605.**
- Property, powers regarding, §4-28-606.**
- Mergers, §4-28-630.
  - Transition concerning real and personal property, §4-28-631.
- Real property.**
- Powers as to property generally, §4-28-606.
  - Statement of authority, §4-28-607.
- Relation to electronic signatures in global and national commerce act, §4-28-633.**
- Relation to other laws, §4-28-603.**
- Service of process.**
- Agent for, §4-28-611.
  - Service on agent, §4-28-612.
- State laws govern operations, §4-28-604.**

## **UNINCORPORATED NONPROFIT ASSOCIATIONS —Cont'd**

**Statement of authority as to real property, §4-28-607.**

**Termination of association, §4-28-629.**

**Title of provisions, §4-28-601.**

### **Transitional provisions.**

- Real and personal property, §4-28-631.
- Savings clause, §4-28-634.

**Uniform application and construction, §4-28-632.**

**Winding up and termination, §4-28-629.**

## **UNITED STATES.**

### **Documents of title.**

- Treaty or statute.
- Relation of article, §4-7-103.

## **UNSOLICITED MERCHANDISE.**

**Generally, §4-86-103.**

## **USAGE OF TRADE.**

**Commercial code, §4-1-303.**

**Sale of goods, UCC.**

- Implied warranty, §4-2-314.

## **V**

## **VENUE.**

### **Foreign investor companies.**

- Actions against companies, §4-31-204.

### **Health-related discount cards not insurance.**

- Action for violation, §4-106-202.

### **Letters of credit.**

- Form for settling disputes, §4-5-116.

### **Monopolies and restraint of trade.**

- Actions by attorney general, §4-75-319.
- Discrimination.
  - Price of manufactured products, coal oil or dressed beef.
  - Actions for recovery of forfeiture, §4-75-501.

### **Unfair practices.**

- Actions by attorney general, §4-75-216.

### **Nonprofit corporations (1993).**

- Judicial dissolution proceeding, §4-33-1431.

### **Registered agents.**

- Venue over represented entity not determined, §4-20-115.

### **Sales representatives.**

- Contractual provisions, §4-70-302.

### **Trademark actions, §4-71-215.**

**VENUE —Cont'd****Unincorporated nonprofit associations.**

Actions involving association,  
§4-28-614.

**VETERANS.****Gravestones.**

Inscription, §4-86-105.

**W****WAIVER.****Art.**

Consignment act.

Voidness of waiver of provisions of  
subchapter, §4-73-205.

**Corporations.**

Notice, §4-26-105.

**Health spas.**

Consumer protection.

Provisions of chapter.

Waiver void and unenforceable,  
§4-94-105.

**Nonprofit corporations.**

Corporation's acceptance of waiver,  
§4-28-224.

**Personal information protection act.**

Provision of chapter.

Void, unenforceable, contrary to  
public policy, §4-110-107.

**Sales representatives.**

Provisions of subchapter.

Prohibited, §4-70-304.

**WAREHOUSE RECEIPTS.**

**Documents of title**, §§4-7-101 to  
4-7-704.

**Duplicate receipts.**

Issuance of duplicate receipts not so  
marked.

Penalty, §4-59-403.

**Fraud.**

Issuance of receipts containing false  
statement.

Penalty, §4-59-402.

**Liens.**

Negotiation of receipts by depositor of  
encumbered goods without  
disclosing facts.

Penalty, §4-59-406.

**Penalties.**

Delivering goods without obtaining  
negotiable receipt, §4-59-405.

Fraudulent issuance of receipt  
containing false statement,  
§4-59-402.

Issuance of duplicate receipt not so  
marked, §4-59-403.

**WAREHOUSE RECEIPTS —Cont'd**  
**Penalties —Cont'd**

Issuance of receipt for goods owned by  
warehousemen without statement  
of ownership, §4-59-404.

Issuance of receipts for goods not  
received or controlled, §4-59-401.

Negotiation of receipt by depositor of  
encumbered or another's goods  
without disclosing facts,  
§4-59-406.

**WAREHOUSES.**

**Documents of title**, §§4-7-101 to  
4-7-704.

**Liens.**

Warehouse's lien, §4-7-209.

Enforcement, §4-7-210.

**Receipts.**

General provisions, §§4-59-401 to  
4-59-406.

**WARNING ORDERS.****Corporations.**

Dissolution.

Involuntary dissolution, §4-26-1107.

**WARRANTIES.**

**Assistive devices**, §§4-105-201 to  
4-105-206.

**Bills of lading.**

Collecting banks.

Warranties of collecting bank as to  
bills, §4-7-508.

Warranties on negotiation or transfer,  
§4-7-507.

**Consumer protection.**

Breach of warranty.

Liability, §4-86-101.

Privity, §4-86-101.

**Documents of title.**

Negotiation and transfer, §4-7-507.

Collecting bank's warranties as to  
documents, §4-7-508.

**Franchises.**

Farm equipment retailer franchise  
protection, §4-72-311.

**Home sales, implied warranties.**

Fitness for particular purpose,  
§4-2-315.

Merchantability, §4-2-314.

Usage of trade, §4-2-314.

**Investment securities.**

Direct holding, §4-8-108.

Effect of signature of authenticating  
trustee, registrar or transfer  
agent, §4-8-208.

Indirect holding, §4-8-109.

**Leases, UCC.**

Breach of warranty.

Damages, §§4-2A-508, 4-2A-519.

**WARRANTIES —Cont'd****Leases, UCC —Cont'd**

## Breach of warranty —Cont'd

Notice of claim or litigation  
answerable over, §4-2A-506.

Waiver or renunciation of rights  
after breach, §4-2A-107.

Cumulation and conflict, §4-2A-215.

## Damages.

Breach of warranty, §§4-2A-508,  
4-2A-519.

Exclusion, §4-2A-214.

## Express warranties.

Generally, §4-2A-210.

Third-party beneficiaries, §4-2A-216.

Fitness for particular purpose.

Implied warranty, §4-2A-213.

## Implied warranties.

Fitness for particular purpose,  
§4-2A-213.

Merchantability, §4-2A-212.

Third-party beneficiaries, §4-2A-216.

## Infringement.

Warranty against, §4-2A-211.

## Interference with goods.

Warranty against, §4-2A-211.

## Merchantability.

Implied warranty, §4-2A-212.

Modification, §4-2A-214.

Third-party beneficiaries, §4-2A-216.

**Lemon law, §§4-90-401 to 4-90-417.**

**Letters of credit, §4-5-110.**

**Motor vehicles.**

Lemon law, §§4-90-401 to 4-90-417.

**Negotiable instruments.**

Presentment warranties, §4-3-417.

Transfer warranties, §4-3-416.

**Pets, §4-97-105.**

**Sale of goods, UCC.**

Cumulation and conflict, §4-2-317.

Exclusions, §4-2-316.

Modification, §4-2-316.

Third-party beneficiaries, §4-2-318.

Damages for breach, §§4-2-317,  
4-2-714.

Express warranties, §4-2-313.

Cumulation and conflict, §4-2-317.

## Exclusions.

Generally, §4-2-316.

Generally, §4-2-313.

## Modification.

Generally, §4-2-316.

Third-party beneficiaries, §4-2-714.

## Implied warranties.

Course of dealing or usage of trade,  
§4-2-314.

Cumulation and conflict, §4-2-317.

**WARRANTIES —Cont'd****Sale of goods, UCC —Cont'd**

## Implied warranties —Cont'd

Exclusions, §4-2-316.

Generally, §4-2-316.

Fitness for a particular purpose,  
§§4-2-315, 4-2-316.

Exclusion or modification,  
§4-2-316.

Merchantability, §4-2-314.

Exclusion or modification,  
§4-2-316.

Modification, §4-2-316.

Third-party beneficiaries, §4-2-318.

## Infringement of enjoyment of goods.

Warranty of title and against  
infringement, §4-2-312.

Merchantability, §4-2-314.

## Shipment and delivery of goods.

Warranty of condition on arrival,  
§4-2-321.

Third-party beneficiaries, §4-2-318.

## Title.

Warranty of title and against  
infringement, §4-2-312.

**Third-party beneficiaries, §4-2-318.**

**Warehouse receipts.**

## Collecting banks.

Warranties of collecting bank as to  
receipts, §4-7-508.

Warranties on negotiation or transfer,  
§4-7-507.

**WATER AUTHORITIES, §§4-35-101 to  
4-35-306.**

**Articles.**

Amendments, §4-35-208.

Contents, §§4-35-201, 4-35-202.

**Board of directors, §4-35-204.**

Officers, §4-35-205.

**Bond issues.**

## Default.

Receiver, appointment, §4-35-303.

Execution of bonds, §4-35-302.

Indenture, §4-35-303.

Issuance of bonds, §4-35-301.

Proceeds, use, §4-35-305.

Refunding bonds, §4-35-306.

Sale of bonds, §4-35-301.

Seal, §4-35-302.

Security for bonds, §4-35-303.

Tax exemption of bonds, §4-35-304.

Terms and conditions of bonds,  
§4-35-301.

**Bylaws, §4-35-207.**

Amendments, §4-35-208.

**Construction of provisions,  
§4-35-104.**

**WATER AUTHORITIES —Cont'd****Conversion from qualified****corporation**, §§4-28-225, 4-33-1601.

Effect, §4-35-203.

Procedure, §4-35-202.

**Definitions**, §4-35-103.**Dissolution**, §4-35-111.**Eminent domain**, §4-35-210.**Filing**.

Amendments, §4-35-208.

**Articles**.Natural resources commission,  
§§4-35-201, 4-35-202.

Secretary of state, §4-35-203.

**Bylaws**.Natural resources commission,  
§4-35-207.**Statement of change**.Registered office and agent,  
§4-35-209.**Formation**, §4-35-201.

Effect, §4-35-203.

**Freedom of information act**.Meetings and records subject to act,  
§4-35-107.**Legislative intent**, §4-35-101.**Members**, §4-35-106.**Names**, §§4-35-201, 4-35-202.**Notice**, §4-35-206.

Bond issues, §4-35-301.

Issuance of bonds, §4-35-301.

Special meetings of the board of  
directors, §4-35-204.**Officers**, §4-35-205.**Powers**, §§4-35-105, 4-35-210.**Public service commission**.Exemption from jurisdiction,  
§4-35-109.**Registered office and agent**,  
§4-35-209.**Revenues**, §4-35-110.**Seal**, §4-35-210.

Bond issues, §4-35-302.

**Taxation**.

Exemptions.

Projects, §4-35-108.

**Title**, §4-35-102.**WATER PROVIDER****CORPORATIONS**.**Water authorities generally**,  
§§4-35-101 to 4-35-306.**WEIGHTS AND MEASURES**.**Advertisements**.

Packages.

Advertising packages for sale,  
§4-18-321.**WEIGHTS AND MEASURES —Cont'd**  
**Apparatus**.

Correct and incorrect apparatus.

Disposition, §4-18-339.

Rules and regulations, §4-18-338.

**Apples**.

Bushel.

Lawful measure, §4-18-332.

Legal weight.

Green apples and dried apples,  
§4-18-331.**Bureau of standards**.

Composition, §4-18-335.

Director, §4-18-334.

Powers and duties, §4-18-334.

Disposition of correct and  
incorrect apparatus,  
§4-18-339.Inspection of packages or amounts  
of commodities, §4-18-342.

Investigations, §4-18-340.

Testing, §§4-18-341, 4-18-344.

**Fees**.

Tests or inspections, §4-18-329.

Field and office standards, §4-18-337.

Rules and regulations, §4-18-338.

**Bushel**.

Apples.

Lawful measure, §4-18-332.

Legal weight.

Green apples and dried apples,  
§4-18-331.Legal weight of bushel of specified  
commodities, §4-18-331.**Civil penalties**, §4-18-323.**Commodities**.

Defined, §4-18-301.

Uniform regulation for the method of  
sale of commodities.

Applicability, §4-18-306.

**Definitions**, §§4-18-301, 4-18-344.**Division of weights and measures**,  
§4-18-311.**Fees**.

Tests or inspections, §4-18-329.

**Fraud**.Fruit and other merchantable  
commodities.Packing, selling, pledging, etc. with  
fraudulent intent, §4-18-330.**Injunctions**, §4-18-325.**Inspections**.Packages or amounts of commodities,  
§4-18-342.**International system of units (SI)**.

Recognition, §4-18-302.

**Investigations**.

Bureau of standards.

Director, §4-18-340.

**WEIGHTS AND MEASURES —Cont'd****Jurisdiction.**

Local officials, §4-18-314.

**Labels.**

Requirements for labeling, §4-18-305.

**Local officials.**

Powers and duties, §4-18-314.

**Misrepresentation.**

Pricing, §4-18-316.

Quantity, §4-18-315.

**Motor vehicle fuel.**

Pumps.

Testing, §4-18-344.

**Open dating.**

Uniform open dating regulation.

Applicability, §4-18-309.

**Packaged commodities.**

Advertising packages for sale,  
§4-18-321.

Information required on packages,  
§4-18-319.

Random weight packages.

Declaration of unit price on,  
§4-18-320.

Defined, §4-18-301.

Requirements for packaging,  
§4-18-305.

**Penalties.**

Civil penalties, §4-18-323.

Fruit and other merchantable  
commodities.

Packing, selling, pledging, etc. with  
fraudulent intent, §4-18-330.

**Presumptions.**

Weighing and measuring devices.

Use for business purposes,  
§4-18-326.

**Price.**

Fractions, §4-18-343.

Misrepresentation of pricing,  
§4-18-316.

Uniform unit pricing regulation.

Applicability, §4-18-307.

**Prohibited acts, §4-18-322.**

Civil penalties, §4-18-323.

Misdemeanors, §4-18-324.

Misrepresentation, §§4-18-315,  
4-18-316.

**Random weight packages.**

Declaration of unit price on, §4-18-320.

Defined, §4-18-301.

**Repeal of prior enabling statute.**

Regulations unaffected by, §4-18-327.

**Restraining orders, §4-18-325.****Rules and regulations.**

Bureau of standards, §4-18-338.

**Sales.**

Method of sale, §4-18-317.

**WEIGHTS AND MEASURES —Cont'd****Sales —Cont'd**

Sale from bulk, §4-18-318.

Defined, §4-18-301.

Uniform regulation for the method of  
sale of commodities.

Applicability, §4-18-306.

**Standards.**

Field standards, §4-18-337.

Office standards, §4-18-337.

Physical standards, §4-18-303.

State standards, §4-18-336.

Verification.

Office standards and field standards,  
§4-18-337.

**State division of weights and  
measures, §4-18-311.****State plant board.**

Division of weights and measures,  
§4-18-311.

Duties, §4-18-312.

Powers, §4-18-312.

Special police powers, §4-18-313.

**Systems of weights and measures,  
§4-18-302.****Testing, §4-18-341.**

Bulk meters or liquefied petroleum gas  
metering devices, pumps and  
scales used for commercial  
transactions, §4-18-344.

**Trees and timber.**

Cord.

Defined, §4-18-333.

**Type evaluation.**

Uniform regulation for national type  
evaluation.

Applicability, §4-18-310.

**Unit pricing.**

Uniform regulation.

Applicability, §4-18-306.

**Weighing and measuring devices.**

Presumptions.

Use for business purposes,  
§4-18-326.

Registration of servicepersons and  
service agencies for commercial  
devices.

Applicability of uniform regulation,  
§4-18-308.

Regulations, §4-18-328.

Technical requirements, §4-18-304.

**Weight.**

Defined, §4-18-301.

**WELLS.****Secured transactions.**

Law governing perfection and priority.

Location of wellhead, §4-9-301.

**WHEELCHAIRS.****Assistive device warranty,**

§§4-105-201 to 4-105-206.

Acceptance of return of device.

Failure to fix nonconformity in  
reasonable amount of time,  
§4-105-204.Allowance for use, §§4-105-204,  
4-105-205.

Assistive device defined, §4-105-201.

Current value of written lease,  
§4-105-205.

Definitions, §4-105-201.

Device not conforming to applicable  
express warranty.Procedure to correct nonconformity,  
§4-105-203.

Express warranties, §4-105-202.

Manufacturer deemed to have  
expressly warranted, §4-105-202.Offer to manufacturer to transfer  
possession of device.Required to receive comparable new  
device or refund, §4-105-206.Reasonable allowance for use,  
§§4-105-204, 4-105-205.Reasonable amount of time to fix  
nonconformity, §4-105-204.

Refund to consumer.

Failure fix nonconformity and  
reasonable amount of time,  
§§4-105-204, 4-105-206.**WHEELCHAIRS —Cont'd****Assistive device warranty —Cont'd**

Repair of nonconformity, §4-105-203.

Reasonable amount of time defects,  
§4-105-204.

Replacement of device.

Failure to fix nonconformity in  
reasonable amount of time,  
§§4-105-204, 4-105-206.

Return of device.

Failure to fix nonconformity in  
reasonable amount of time,  
§4-105-204.

Valuation, §4-105-205.

**WILLS.****Nonprofit corporations (1993).**Requests and devises after merger,  
§4-33-1107.**WIRE TRANSFERS.****Funds transfers, UCC, §§4-4A-101 to  
4-4A-507.****WITNESSES.****Consumer protection.**

Court order to appear, §4-88-112.

**Monopolies and restraint of trade.**

Unfair practices, §4-75-211.

**WRITINGS.****Statute of frauds, §§4-59-101 to  
4-59-103.**











